(18,943.)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1903.

No. 292.

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THE SAN FRANCISCO NATIONAL BANK, APPELLANT,

*vs.*

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),

Complainant,

vs.

WASHINGTON DODGE, as Assessor, of the City and County of San Francisco, State of California.

Respondent.

## Bill of Complaint.

To the Judges of the Circuit Court of the United States, for the Northern District of California, in the Ninth Circuit, Sitting in Equity:

The San Francisco National Bank, a national banking association, organized and existing under and by virtue of the laws of the United States, brings and files this its bill of complaint against Washington Dodge, as assessor of the city and county of San Francisco, State of California, and thereupon humbly complaining your orator, The San Francisco National Bank, shows your Honors as follows:

First.—That your orator is, and at all the times hereinafter mentioned was, a national banking association, formed, organized, and existing under and by virtue of the laws of the United States for carrying on the busi-

ness of banking, as provided for and authorized by the provisions of the statutes of the United States in this behalf. That it has its banking house and principal place of business where its operations of discount and deposit are carried on and where its general business is conducted, as authorized and provided for in its articles of association, in the city and county of San Francisco, State of California. That the capital stock of your orator is $500,000, divided into 5,000 shares of the par value of $100 each, and certificates for all of said shares are outstanding and are owned by a large number of persons.

Second.—That the respondent, Washington Dodge, is the duly elected, qualified, and acting assessor of the city and county of San Francisco, State of California, and that the said respondent, as such assessor, is a citizen and a resident of the said State of California, and is a resident and an inhabitant of the said Northern District of California, and is the person and officer, under and by virtue of the laws of the State of California, authorized, as hereinafter more particularly set out, to assess taxes for and in the said city and county of San Francisco.

Third.—That by an act of the legislature of the State of California, approved March 7, 1881, entitled "An act to amend the Political Code of the State of California, relating to revenue, by adding a new section to be known as section 3608 of said code, and by amending sections 3607, 3617, 3627, 3629, 3650, and 3651, and 3652, of said code, and by repealing section 3640 of said code, all relative to revenue," there was, among other things, on said

7th day of March, 1881, added to the Political Code of the said State of California a new section, numbered 3608, in the words and figures following, to wit:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor."

That by an act of the legislature of the 14th day of March, 1899, entitled, "An act to amend section thirty-six hundred and eight of the Political Code of the State of California, relating to the general revenue of the State, and to property liable to taxation for the purpose of revenue; and to add new sections, to be known as sections thirty-six hundred and nine and thirty-six hundred and ten, also relating to the general revenue of the State; and to property liable to taxation for the purpose of revenue," said section 3608 was, on said 14th day of March, 1899, amended so as to read as follows:

"3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations (save and except the property of national banking associations not assessable by federal statute),

shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation (save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute)."

That by said act of March 14, 1899, there were, on said 14th day of March, 1899, added to the said Political Code of the State of California, two new sections numbered respectively 3609 and 3610, and being respectively in the words and figures following, to wit:

"3609. The stockholders in every national banking association doing business in this State, and having its principal place of business located in this State, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town or county, or not; but in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits in the same manner as such deductions are allowed by the provisions of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California. In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total

value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State.

"3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholder of such assessment shall be necessary for the purpose of this act. And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid."

Fourth.—That under and by virtue of the constitution of the said State of California, all property not exempt from taxation under the laws of the United States and under the laws of the said State of California in the possession or under the control of any person at twelve o'clock M. on the first Monday in March of each year, is

subject to assessment and taxation, as by the laws of the said State of California provided, for the fiscal year ending on the 30th day of June of the next succeeding year, as hereinafter more particularly set out.

Fifth.—That pursuant to the requirements of the Revised Statutes of the United States, the President and cashier of your orator have at all times caused to be kept, and do now keep, in the office where the business of your orator is transacted, to wit, at its said office in the said city and county of San Francisco, a full and correct list of the names and residences of all of the shareholders of your orator, said list containing the number of shares held by each of said shareholders. That said list during all of the times herein mentioned has been and is, during business hours of each day in which business could have been or may be legally transacted, subject to the inspection of the respondent, and that on or about the 12th day of March, 1900, your orator, at the request of the respondent, gave and delivered to the respondent a full and correct list of the names and residences of the shareholders of your orator as the same existed at twelve o'clock M. on the 5th day of March, 1900; said 5th day of March, 1900, being the first Monday in March, 1900, and said list containing and showing the number of shares held by each of said shareholders at twelve o'clock M. on said 5th day of March, 1900; that the number of said shareholders at twelve o'clock M. on said first Monday in March, 1900, was seventy-seven.

Sixth.—That under the provisions of the constitution of the said State of California the fiscal year in the said State of California is from the first day of July of each

year to the thirtieth day of June of the next succeeding year, and that under and in pursuance of acts of the legislature of the State of California, and in conformity thereto, and under and in pursuance of various municipal orders and ordinances of the city and county of San Francisco, and in conformity thereto, the board of supervisors of the said city and county of San Francisco did, on the third Monday in September, 1899, levy a tax for the purposes of the said city and county of San Francisco for the fiscal year ending June 30th, 1900, on all property both real and personal in the said city and county of San Francisco (excepting such property as is by law exempt from taxation), of the sum of one dollar and two cents and nine mills ($1.029) on each one hundred dollars' valuation of said taxable property upon the assessment-books of said fiscal year; and that the State Board of Equalization of the said State of California, pursuant to the laws of the said State of California, fixed the rate of taxation for the purposes of the said State of California on all assessable property in the said city and county of San Francisco for the said fiscal year ending June 30th, 1900, at the rate of sixty cents and one mill ($.601) on each one hundred dollars' valuation of taxable property in the said city and county of San Francisco; and that the said board of supervisors on the said third Monday in September, 1899, under and in pursuance of the Political Code and of the statutes of the State of California, and in conformity thereto, and in pursuance of the said action of the said State Board of Equalization, and in conformity thereto, did levy a tax for State purposes for said fiscal year ending June

30th, 1900, on all property, both real and personal, in the said city and county (except such property as is by law exempt from taxation), of the sum of sixty cents and one mill ($.601) on each one hundred dollars' valuation of said taxable property upon the assessment-roll for said fiscal year; the combined rate of taxation for said fiscal year for State and city and county purposes amounting to the sum of one dollar and sixty-three cents ($1.63) on each one hundred dollars' valuation of taxable property in the said city and county of San Francisco.

Seventh.—That under and by virtue of the laws of the said State of California, every tax due upon personal property is a lien upon the real property of the owner of such personal property, from and after twelve o'clock M. of the first Monday in March of each year; and that under and pursuant to the said laws of the said State of California the respondent claims the right, when any taxes on personal property are not a lien upon real property sufficient to secure the payment thereof, to collect all such taxes between the first Monday in March and the third Monday in July of each year; and under said laws said respondent claims the power to make such collection by seizure and sale of any personal property owned by the person against whom such tax is assessed, said sale to be of an amount of such personal property sufficient to pay the taxes, the percentage thereon provided by law, and the costs of sale; and that, under and by virtue of said laws the respondent is governed as to the amount of taxes to be collected on such personal property by the State and city and county rate of taxation for the previous fiscal year; that under and pursuant

to the provisions of the said section 3610 of the said Political Code and in and by said section, it is provided that in case the tax on any stock in a national bank is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor, and the respondent in and by said section is directed to collect such tax from such bank.

Eighth.—That on said first Monday of March, 1900, to wit, on March 5th, 1900, at twelve o'clock M. of said day, your orator did not own, thence hitherto has not owned, and does not now own, any real estate, either in the city and county of San Francisco, State of California, or elsewhere.

That on said first Monday of March, 1900, to wit, on March 5th, 1900, at twelve o'clock M. of said day, your orator held and owned the following personal property: $50,000 of bonds of the United States; the premium on said bonds having on said day and at said time been the sum of $4,800, making the said $50,000 of United States bonds with the premium thereon equal to the sum of $54,800; $175,748 in cash; furniture of the value of $5,450; solvent credits over and above the debtc due and owing by your orator amounting to the sum of $343,663.-32; redemption fund $2,250; all of said hereinbefore enumerated property being exempt from assessment and taxation under the laws of the United States and of the State of California; the said property being all of the assets and property owned and held by your orator at twelve o'clock M. on said 5th day of March, 1900.

Ninth.—That the respondent has notified and informed your orator and the respective stockholders of

your orator, that he is about to assess, and your orator verily believes that unless restrained by the order of this Honorable Court, he will, under and by virtue of the aforesaid act of the legislature of March 14th, 1899, amending certain sections of the Political Code of the State of California as hereinbefore set forth, and not otherwise, assess the shares of the capital stock of your orator at a valuation of $104.36 per share for each and every share of the capital stock of your orator; and in case the tax on any of such stock is unsecured by real estate owned by the respective holders of such stock, then and in that event, the respondent threatens to, and, as your orator verily believes, unless restrained by the order of this Honorable Court, he will, collect, as provided in and by section 3610 of the said Political Code, the amount of such tax from your orator at the hereinbefore alleged rate of taxation of $1.63 on each one hundred dollars of the said valuation of said stock at $104.36 per share. That the amount of such tax at the said rate of $1.63 upon each one hundred dollars' valuation of said stock at $104.36 per share, will be the sum of $1.701068 upon each share of said capital stock. That on said 5th day of March, 1900, at twelve o'clock M. of said day, the taxes upon 1775 shares of said capital stock were, ever since have been and now are, unsecured by real estate owned by the holders of such stock; that the taxes for the said fiscal year ending June 30th, 1901, at the said rate of $1.63 upon each one hundred dollars' valuation of $104.36 for each of said 1775 shares of stock will be the sum of $3,019.39. That said respondent has notified and informed and threatened your orator that said sum

of $3,019.39 will be collectible from your orator, and that, unless restrained by the order of this Honorable Court, he will enforce payment and collection of said sum of $3,019.39 from your orator; and your orator verily believes that said respondent, unless restrained therefrom by the order of this Honorable Court, will carry out and execute his aforesaid threats to make said assessment upon the capital stock of your orator as hereinbefore stated, and to enforce collection and payment of the sum of $3,019.39 as and for the tax on 1775 shares thereof, of and from your orator as hereinbefore stated.

Tenth.—That your orator is informed by said respondent, and verily believes, and upon and according to such information and belief charges the fact to be, that said respondent, unless restrained therefrom by the order of this Honorable Court, in making said assessment upon the shares of the capital stock of your orator, will make the same in the manner following, that is to say: He will add together

(1) The amount of the paid up capital of your orator, to wit, the sum of..... $500,000

And (2) The amount of the undivided profits of your orator, as the same are by the respondent claimed to have existed at 12 o'clock M. on the 5th day of March, 1900, to wit, the sum of..... 77,260

And together amounting to the sum of. $577,260

That from said sum of $577,260, he will deduct

(1) The bonds of the United States, to secure the circulation of your orator, as

owned by your orator at twelve o'clock M. on said 5th day of March, 1900, and amounting to the sum of...$ 50,000

And (2) The value of the furniture of your orator, as by the respondent claimed to have been owned by your orator at 12 o'clock M. on said 5th day of March, 1900, and amounting to the sum of... 5,500

And together amounting to the sum of.$ 55,500

Leaving a balance, after deducting from.....$577,260

the sum of..... ... 55,500

Of.....$521,760

That he will divide the said sum of $521,760, by 5,000, being the total number of the shares of the capital stock of your orator, with the result that each five thousandth part of said sum of $521,760 will be the sum of $104.352; which said sum of $104.352 said respondent claims to be the assessable value per share of each share of the capital stock of your orator, and which said sum of $104.352 for purposes of assessment and taxation for the said fiscal year ending June 30th, 1901, the said respondent threatens to and will treat as $104.36, as the assessable value per share of each share of the capital stock of your orator.

Eleventh.—That the said assessment and taxation, so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator, will be in violation of, and repugnant to, the provisions of sections 5219 and 1977 of the Revised Stat-

utes of the United States, in that the said assessment and taxation will be at a greater rate than is or will be assessed upon other moneyed capital in the hands of individual citizens of the said State of California. And in that behalf your orator shows that under and by virtue of the laws of the said State of California, all shares of stock in corporations organized under the laws of the said State and amounting to more than the sum of two hundred million dollars ($200,000,000), and especially in corporations organized under the laws of the said State for the purpose of banking, all shares of stock thereof and amounting to more than the sum of thirty-five million dollars ($35,000,000), are expressly exempt from assessment and taxation, and the same are not subject thereto, and that the respondent has not assessed and will not assess, for the said fiscal year ending June 30th, 1901, and does not intend to assess, to the holders of shares in corporations organized under the laws of the said State of California, the value of the same, or to collect from such shareholders any taxes on said shares or the value thereof.

And your orator further shows that the said pretended assessment and taxation so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator, will be in violation of, and repugnant to, the provisions of said section 5219 of the Revised Statutes of the United States, in that the said taxation will be at a greater rate than will be assessed upon other moneyed capital in the hands of individual citizens in the State of California. And in that behalf your orator further shows that in assessing and

taxing the said shares of the capital stock of your orator no deduction will, or can legally, be made from the valuation of said shares, or any of them, of debts unsecured by deed or trust, mortgage or other lien on real or personal property due or owing by the stockholders of your orator, or by any of them, to bona fide residents of the State of California; and that in assessing and taxing other moneyed capital in the form of solvent credits unsecured by deed of trust, mortgage or other lien on real or personal property, due or owing to, or in the hands of, individual citizens in said State of California, the respondent does and will make a deduction from said credits, under and by the constitution and laws of the State of California, of the debts unsecured by trust deed, mortgage or other lien on real or personal property as may be owing by such individual citizens, or by any of them, to bona fide residents of the State of California, and that said threatened assessment and taxation of the shares of your orator is, and will be unjust, unlawful and illegal, and will discriminate against and upon such shares and against and upon the persons owning and holding the same, and will compel them to sustain and bear more than their just share and burden of the taxes of the said State of California. And in this behalf your orator further avers that it is informed and believes, and upon such information and belief states the fact to be, that the amount of moneyed capital in the City and County of San Francisco in said State of California on the first Monday of March, 1900, to wit, on March 5th, 1900, at noon of said day, invested by banks and bankers, having their principal place of business in

said city and county, and residents therein, in unsecured solvent credits, and from which, under the constitution and laws of said State, unsecured debts can be deducted, was the sum of $14,074,561; and on the day and year last aforesaid, the amount of moneyed capital in the State of California, other than in the said City and County of San Francisco, invested by banks and bankers in unsecured solvent credits, and from which, under the constitution and laws of said State unsecured debts can be deducted, was the sum of $7,589,302; that on the day and year last aforesaid, said banks and bankers at said City and County of San Francisco had debts unsecured by trust deed, mortgage or other lien on real or personal property owing by such banks and bankers in said city and county amounting to the sum of $36,710,062; and that on said day last aforesaid, the amount of debts unsecured by trust deed, mortgage or other lien on real or personal property owing by said banks and bankers in the State of California, other than in the said City and County of San Francisco, was the sum of $32,400,304. That the amount of moneyed capital invested in such solvent credits by such banks and bankers on the day and year last aforesaid in said City and County of San Francisco and in said State of California, as compared with the amount of moneyed capital invested in the shares of the capital stock of your orator, is so large and substantial that the assessment and taxation of the shares of the capital stock of your orator without deducting therefrom and without being able to deduct therefrom debts unsecured by trust deed, mortgage or other lien on real or personal property, as may have

been owing by the respective holders of the shares of the capital stock of your orator, on the day and year last aforesaid, will be an illegal and unjust discrimination against the owners and holders of the shares of the capital stock of your orator, and will make the taxation of said shares of stock at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens in the State of California, and particularly in the City and County of San Francisco, in said State. And in this behalf your orator further avers that the said solvent credits so held as aforesaid by banks and bankers in the said City and County of San Francisco and in the said State of California are moneyed capital in the hands of individual citizens of the State of California which enter into competition for business with your orator.

Twelfth.—That in the making of the said assessment of the said shares of the capital stock of your orator, the respondent will not proceed in the manner directed by the said act of March 14th, 1899, in this: That the said respondent, as hereinbefore set out, will ascertain and determine the value of each of the shares of the capital stock of your orator to be the sum of $115.452, and will deduct therefrom the sum of $11.10 per share as the proportionate amount per share of the value of the United States bonds held by your orator to secure its circulation, and of its furniture, and will, as hereinbefore set out, assess to the stockholders the sum of $104.36 per share as the value of each share of said capital stock by the said respondent claimed to be subject to assessment and taxation under the provisions of said act of

March 14th, 1899, and that the respondent will wholly fail and refuse to make any other or further deductions from such ascertained value of said shares, in order to determine the assessable value thereof, whereas, by the provisions of said section 3609 of the Political Code of the State of California, under and in pursuance whereof the respondent has threatened and intends to make the said assessment and will proceed to demand and will attempt to collect the taxes aforesaid, he was and is required to deduct from the value of each share of the capital stock of your orator, such sum as is in the same proportion to such value as the total value of the real estate and property of your orator exempt by law from taxation bears to the whole value of all the shares of the capital stock of your orator. That on the first Monday of March, 1900, to wit, on March 5th, 1900, at twelve o'clock M. of said day, your orator had not, and thence hitherto has not had, nor has it now, any real estate, and as in paragraph "Eighth" hereof averred, all of the property of your orator consisted on said day and at said time, and has thence hitherto consisted, and does now consist of its bonds, money on hand, credits, furniture and other personal property, and on said day and at said time the same constituted and were, and thence hitherto have been, and now are, the assets of your orator, and were and are used and employed by it in the conduct and carrying on its business as a national banking association under and by virtue of the provisions of the act of the Congress of the United States known as the National Bank Act, and were and are exempt by law from assessment and taxation. That if deduction of all

the property of your orator exempt from assessment and taxation as last aforesaid were made to each stockholder in assessing said stock there would remain nothing of value subject to assessment and taxation, and that the pretended assessment and taxation of said shares at said value of $104.36 per share would be based wholly upon supposed and fictitious property and upon property exempt by the Constitution and laws of the United States from assessment and taxation.

Thirteenth.—That in and by said section 3610 of said Political Code, it is provided that in case the tax on any stock in a national bank is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor and the assessor shall collect the same from said bank which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien prior to all other liens on said stock and the dividends and earnings thereof for the reimbursement to it of the taxes so paid. That the ownership of the shares of the capital stock of your orator or of any of them may and does change by the endorsement and transfer of the certificate or certificates representing a given number of said shares without there being any change in the name or names in which the said certificate or certificates stand on the books of your orator. That while the shares of stock of your orator on the first Monday of March, 1900, at noon of said day, may have been owned as the same appear upon the books of your orator and as the names of the owners thereof appear in the list of stockholders kept by your

orator as hereinbefore alleged, yet intermediate that day and the day when the respondent may call upon and demand payment of your orator of the taxes to be levied upon such shares of stock upon said assessment, the ownership of said shares of stock may have wholly changed; so that while your orator may have known who the owners of said shares of stock were on the first Monday of March, 1900, at noon of that day, yet at the time a demand upon your orator for the payment of said tax by said respondent is made, your orator may be wholly unable to discover who are the owners of the same or to whose account the amount of such tax so paid will or can be charged; and such owners may by that time have altogether ceased to have any account with your orator or to hold or own any of the stock of your orator, and there may be neither shares of stock nor dividends from which your orator can deduct or withhold payment of the amount of said tax in case it pay the same.

That should your orator be compelled by said respondent to pay said tax upon the stock of its stockholders as aforesaid, it would be impossible for your orator to charge the amount of said tax to the accounts of the respective stockholders owning said shares of stock, inasmuch as your orator may be wholly unable to know who were the real owners of such shares of stock, or of any of them, or who or what stockholders were legally liable for the amount of such tax by reason whereof the amount of said tax would be irretrievably lost to your orator.

That if your orator should pay the amount of said tax so as aforesaid threatened to be levied, imposed and de-

manded by said respondent as aforesaid, and should attempt to charge the proportionate amount thereof to the persons in whose names the said shares of stock stood on the first Monday of March, 1900, to wit, on March 5th, 1900, at noon of said day or at any other time, on the books of your orator, according to the number of shares standing in the name of each person, your orator would be subjected to and would be harassed by a great multiplicity of suits by and on behalf and at the instance of the several stockholders of your orator. And in this behalf your orator shows that any one or more of said stockholders would have the right of resisting and contesting the payment of any tax on any share or shares of the capital stock of your orator owned by such stockholder, and would have the right to show that at twelve o'clock noon of said first Monday of March, 1900, he was not legally liable therefor, and that your orator had made payment of the said tax in its own wrong in case it should have paid the same, and in case it should result that your orator had made illegal payment of the said tax such illegal payment would constitute a breach of trust and illegal diversion of the corporate assets of your orator from the trust upon which it holds the same for the benefit of its creditors and stockholders.

Fourteenth.—That the said threatened seizure and sale by the respondent of personal property of and belonging to your orator sufficient to raise the amount necessary to pay said sum of $3,019.39, will, unless restrained by order of this Honorable Court, deprive your orator of its property without due process of law, and that the said threatened assessment and taxation and threatened seiz-

ure and sale are and will be contrary to and in violation of and repugnant to the rights and privileges of your orator and of the stockholders of your orator, under and pursuant to the provisions of the constitution and laws of the United States, and under and pursuant to the provisions of the constitution and laws of the State of California, and particularly under and pursuant to the provisions of section 1 of article XIV of the Amendments of the Constitution of the United States and under and pursuant to the provisions of the act of the Congress of the United States known as the National Bank Act and under and pursuant to the provisions of section 1 of article XIII of the Constitution of the State of California.

That said act of the legislature of the State of California of March 14th, 1899, under and pursuant to which said respondent is claiming to act and is acting and threatening to make said seizure and sale, is repugnant to and in violation of the rights and privileges of your orator and of the stockholders of your orator, under and pursuant to the provisions of the constitution and laws of the United States, and particularly under and pursuant to the provisions of section 1 of article XIV of the Amendments of the Constitution of the United States and under and pursuant to the provisions of the act of Congress of the United States known as the National Bank Act, and under and pursuant to the provisions of section 1977 of the Revised Statutes of the United States.

That if the provisions of said act of the legislature of March 14th, 1899, were constitutional and legally valid, your orator would thereunder be protected only in pay-

ing the tax of the stockholder or stockholders who owned stock of your orator at twelve o'clock noon on said first Monday of March, 1900, and who did not own real estate to secure the payment of the same, and would not be protected in paying said tax, or any part thereof, where, at the time of the payment by your orator of the taxes on such shares, such shares had theretofore actually changed in ownership and had become the property of any person or persons other than and different from those persons owning it at twelve o'clock noon on said first Monday of March, 1900, or had become the property of any person or persons who at the time of payment of such tax by your orator might own real estate to secure the payment of the tax on said shares of stock, the ownership of said real estate by such stockholders being unknown to your orator at the time of making such payment. By reason of all of which your orator would be involved in great doubt and uncertainty as to its rights and duties in the premises and would be exposed to the possibility of a great multiplicity of litigation, to the loss and detriment of all nondelinquent stockholders of your orator, as all such litigation must necessarily tend to diminish the funds of your orator, to the loss and detriment of those rightfully and beneficially entitled thereto and therein.

Fifteenth.—That this is a suit in equity of a civil nature; that the matter in dispute, exclusive of interest and costs, exceeds the sum or value of two thousand dollars, to wit, the sum of $3,019.39 as hereinbefore alleged; and that this cause is a suit arising under the constitution and laws of the United States, to wit, under the

provisions of section 1 of article XIV of the Amendments of the Constitution of the United States, and under the provisions of the act of the Congress of the United States known as the National Bank Act, and particularly under the provisions of sections 5219 and 1977 of the Revised Statutes of the United States.

Sixteenth.—Your orator further shows that only in and under the process of this Honorable Court as a Court of Equity can it have relief or protection from the great multiplicity of suits at law or in equity to which it may be subjected by seizure and sale of any of its property in payment or satisfaction of the tax threatened to be collected by the threatened assessment which said respondent threatens to make as hereinbefore alleged, collection and payment of which said respondent gives out and threatens to make as hereinbefore stated.

In consideration whereof, and forasmuch as your orator is remediless in the premises under the strict rules of the common law and can have adequate relief only in a Court of Equity where matters of this sort are properly cognizable and relievable, your orator prays that an injunction may issue out of this Court restraining and enjoining the said respondent and his successors from making the said threatened assessment and taxation upon the shares of the capital stock of your orator, and from listing in the assessment-book prepared or to be prepared by the respondent for the fiscal year ending June 30th, 1901, or from listing in any other manner or at all, in the said assessment-book, the, or any of the, shares of the capital stock of your orator, and from making the said threatened seizure and sale of the property of your

orator, or from in any manner interfering with the said shares of the capital stock or with the property of your orator, or from instituting any suit or suits, action or actions, against your orator for the collection of any taxes claimed to be due upon any of the shares of the capital stock of your orator; and your orator prays that in the meantime, and until the hearing hereof, a preliminary restraining order and injunction pendente lite, embracing all of the relief herein prayed for, issue out of this Honorable Court, directed to the said respondent, such preliminary restraining order and injunction to continue in force until the determination of the final hearing herein, and that upon the final hearing of this cause this Court do adjudge and declare said threatened assessment, and all action thereunder, and the said statute under which said respondent threatens to make said assessment, illegal and void, and forever enjoin said respondent from making said threatened assessment, and that your orator may have all the injunctions herein prayed for made perpetual; and that your orator may have such other and further relief as this cause may require, as well as its costs.

May it please your Honors to grant unto your orator a writ or writs of subpoena to be issued out of and under the seal of this Honorable Court and directed to the said respondent, Washington Dodge, as Assessor of the said City and County of San Francisco, commanding the said respondent to appear in this cause at some day certain to be named therein and to answer in the premises, but not under oath, answer under oath being expressly

waived, and to abide by and perform such decree as may be rendered herein.

THE SAN FRANCISCO NATIONAL BANK,

[Seal] By JAMES K. WILSON,

President.

E. S. PILLSBURY,

Solicitor for Complainant.

ALFRED SUTRO,

Of Counsel.

Northern District of California,
State of California, } ss.
City and County of San Francisco.

J. K. Wilson, being first duly sworn, says: That he is and always has been the president of The San Francisco National Bank, the complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon information or belief, and as to those matters that he believes it to be true; and further that the seal affixed to said bill is the corporate seal of the complainant and was affixed to said bill by him, and the name of said complainant was signed by him to said bill, by authority of said complainant.

JAMES K. WILSON.

Subscribed and sworn to, before me, this 25th day of April, A. D. 1900.

[Seal] GEORGE F. HATTON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Bill in Equity to Enjoin Assessment etc. Filed April 25th, 1900. Southard Hoffman, Clerk.

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**Subpoena Ad Respondendum.**

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.*

IN EQUITY.

The President of the United States of America, Greeting, to Washington Dodge, as Assessor of the City and County of San Francisco, State of California.

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco on the fourth day of June A. D., 1900, to answer a bill of complaint exhibited against you in said court by The San Francisco National Bank, a national banking association organized and existing under and by virtue of the laws of the United States, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 25th day of April in the year of our Lord one thousand nine hundred, and of our independence the 124th.

[Seal] SOUTHARD HOFFMAN,
Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of June next at the clerk's office of said court, pursuant to said bill; otherwise the said bill wil be taken pro confesso.

SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 25th day of April, 1900, and personally served the same on the 25th day of April, 1900, on Washington Dodge, as Assessor of the City and County of San Francisco, State of California, by delivering to and leaving with Washington Dodge, as Assessor of the City and County of San Francisco, State of California, said defendant named therein at the City and County of San Francisco, in said District, an attested copy thereof, together with a copy of the bill of complaint certified to by plaintiff's attorney.

San Francisco, April 25th, 1900.

JOHN H. SHINE,
United States Marshal.
By S. P. Monckton,
Office Deputy.

Filed April 26. 1900. Southard Hoffman, Clerk.

*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),

Complainant,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California,

Respondent.

## Answer to Bill of Complaint.

The answer of Washington Dodge, as Assessor of the City and County of San Francisco, State of California, respondent in the bill of complaint entitled "The San Francisco National Bank, Complainant, against Washington Dodge, as Assessor of the City and County of San Francisco, Respondent."

This respondent, now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as this respondent is advised it is material or necessary for him to make answer to, answering, says:

I.

And admits the facts alleged in paragraph "First" of complainant's bill of complaint.

II.

And admits the facts alleged in paragraph "Second" of complainant's bill of complaint.

III.

And admits the facts alleged in paragraph "Third" of complainant's bill of complaint.

IV.

And admits and alleges that under and by virtue of Constitution of the State of California, all property, real, personal, or mixed, not exempt from taxation under the laws of the United States, or under the laws of the State of California, belonging to, owned by, claimed by, in the possession or under the control of any person, at twelve o'clock M. on the first Monday in March in each year, is subject to assessment and taxation, as by the laws of the State of California provided, for the fiscal year ending on the 30th day of June of the next succeeding year.

V.

And respondent admits the facts alleged in paragraph "Fifth" of complainant's bill of complaint.

VI.

And respondent admits the facts alleged in paragraph "Sixth" of complainant's bill of complaint.

VII.

And respondent admits the facts alleged in paragraph "Seventh" of complainant's bill of complaint.

VIII.

And respondent admits that on the first Monday in March, 1900, at 12 o'clock M. of said day, complainant did not own, thence hitherto has not owned, and does not now own, any real estate, either in the City and County of San Francisco, State of California, or elsewhere.

And respondent admits that on the first Monday in March, 1900, at 12 o'clock M. of said day, complainant owned and held the following personal property: $50,000 of bonds of the United States; the premium on said day and at said time having been the sum of $4,800; furniture of the value of $5,450; redemption fund of $2,250; $175,748 in cash; solvent credits over and above the debts due and owing by complainant amounting to the sum of $343,663.32; but respondent denies that all of said hereinbefore enumerated property, or any thereof, is exempt from assessment or taxation under the laws of the United States, or of the State of California; and respondent alleges that he has no information or belief upon the subject sufficient to enable him to answer, and, basing his denial on that ground, denies that said property was, or is, all of the assets or property owned or held by complainant at 12 o'clock M. of the 5th day in March, 1900.

IX.

But respondent denies that he has notified or informed complainant, although he admits he has notified and informed the respective shareholders of complainant, that he is about to assess, and unless restrained by this Honorable Court, he will, under and by virtue of the aforesaid act of the legislature of March 14th, 1899, amending certain section of the Political Code of the State of California as hereinbefore set forth, assess the shares of the capital stock of complainant at a valuation of $104.36 per share for each and every share of the capital stock of complainant; but complainant denies that in case the tax or any of such stock is unsecured by real estate or otherwise, owned by the respective holders of such stock, then or in that event, or otherwise, respondent threatens to collect, as provided in or by said section 3610 of the said Political Code, the amount of such or any tax from complainant, at the hereinbefore rate of taxation of $1.63 on each one hundred dollars of the valuation of said stock at $104.36 per share. And respondent admits that the amount of such tax at the said rate of $1.63 upon each one hundred dollars' valuation of said stock at $104.36 per share, will be the sum of $1.701068 upon each share of said capital stock. But respondent alleges that he has no information or belief upon the subject sufficient to enable him to answer, and basing his denial on that ground, denies that on the 5th day of March, 1900, at twelve o'clock M. of said day, the taxes upon 1775 shares, or any number of shares, or any share or shares, of said capital stock were, ever since have been, or now are, unsecured by real estate owned

by the holders of such stock; but respondent admits that the taxes for the fiscal year ending June 30, 1901, at the rate of $1.63 upon each one hundred dollars' valuation of $104.36 for each said 1775 shares of stock, will be the sum of $3,019.39. Respondent denies that he has notified or informed or threatened, or notified and informed and threatened complainant that said sum of $3,019.39, or any other sum, or any part thereof, will be collectible from complainant, or that, unless restrained by the order of this Honorable Court, or otherwise, he will enforce payment or collection of said sum of $3,019.39, or any other sum, or any part thereof, from complainant.

X.

And respondent admits that, unless restrained by the order of this Honorable Court, he will proceed with the assessment of the capital stock of complainant to the person or persons who owned, claimed, possessed or controlled the shares thereof at 12 o'clock M. on the first Monday in March, 1900; and that in making such assessment of such stock to such person or persons, as aforesaid, he will proceed in the manner alleged in paragraph "Tenth" of complainant's bill of complaint.

XI.

(a) And respondent denies that the assessment and taxation of the capital stock of complainant, when made in the manner aforesaid, will be in violation of, or repugnant to, or in violation of, and repugnant to, the provisions of sections 5,219 or 1,977 of the Revised Statutes of the United States or of either of them, in that such assessment or taxation would be at a greater rate than

is or will be assessed upon other moneyed capital in the hands of individual citizens of the State of California, or for any other reason or at all.

(b) Respondent denies that under and by virtue of the laws of the State of California, or otherwise, or at all, all or any shares of stock in corporations organized under the laws of the said State, and amounting to more than the sum of $200,000,000, or any other sum, are expressly or otherwise exempt from taxation, or that the same are not subject thereto; and denies that especially corporations organized under the laws of said State for the purpose of banking, or all shares thereof or amounting to more than the sum of $35,000,000, or any other sum, are expressly or otherwise exempt from taxation, or that the same are not subject thereto; and denies that the respondent has not assessed for the fiscal year ending June 30, 1901, or that he does not intend to assess to the holders of shares in corporations organized under the laws of the State of California, the value of the same, or to collect from such stockholders any taxes on said shares or the value thereof.

And in this behalf respondent charges the facts to be that all the property, real, personal and mixed, belonging to, owned, claimed, possessed or controlled by any and all corporations or banking associations or corporations at 12 o'clock M. on the first Monday in March, of each year, except such property as is, by the laws of the State of California or of the United States, exempt from assessment and taxation, is required, under and pursuant to the constitution and laws of the State of California to

be assessed and taxed at its full value; that between the first Mondays in March and July, 1900, all property, real, personal, and mixed, belonging to, owned, claimed, possessed or controlled by any corporation organized or existing under or by virtue of the laws of the State of California, at 12 o'clock M. on the first Monday in March, 1900, and not exempt from assessment and taxation by the laws of the State of California, or of the United States, will be assessed at its full value; that the constitution and laws of the State of California do not authorize or require the assessment or taxation eo nomine of the shares of the capital stock of corporations organized and existing under and by virtue of such laws, when the property of such corporations is situated, assessed and taxed in said State at its full value; but that the said constitution and laws of said State do authorize and require the assessment and taxation of the shares of the capital stock of all corporations organized as aforesaid, the property of which is not situated, assessed or taxed in the State of California.

That respondent is informed and believes, and upon such information and belief alleges, that under the constitution and law of the State of California, as the same have been and are construed, interpreted and declared by the Courts of said State, a share of the capital stock of corporations organized and existing under and by virtue of the laws of the State is of no intrinsic value whatsoever, over and above the corporate property which it stands for and represents, that the assessment and taxation of the entire corporate property is the assessment and taxation of the shares of the capital stock of such

corporation, and that the assessment and taxation of both the corporate property and the shares of the capital stock of such corporation would be double or duplicate taxation; which double or duplicate taxation is inhibited by the constitution and laws of the State of California.

(c) And respondent denies that such assessment and taxation upon the shares of the capital stock of complainant would, or will be, in violation of, or repugnant to, or in violation of, and repugnant to, the provisions of section 5,219, of the Revised Statutes of the United States or any statute, in that such taxation would, or will be at a greater rate than would or will, be assessed upon other moneyed capital in the hands of individual citizens in the State of California. And respondent denies that in assessing and taxing the shares of the capital stock of complainant, no deduction would or will, or can legally be made from the valuation of shares, or any of them, of debts unsecured by deed of trust, mortgage, or other lien, on real or personal property due or owing by the stockholders of complainant, or by any of them, to bona fide residents of the State of California; and in this behalf respondent alleges that unless restrained from making an assessment of the share of the capital stock of complainant, by order of this Honorable Court, he will, in making such assessment, permit to be made and make a deduction from the valuation of such shares, and of each and all of them, of debts unsecured by deed of trust, mortgage or other lien on real or personal property, due or owing by the holders of such shares to bona fide residents of the State

of California; and in this behalf respondent alleges that unless restrained from making an assessment of the share of the capital stock of complainant, by order of this Honorable Court, he will, in making such assessment permit to be made and make a deduction from the valuation of such shares, and of each and all of them, of debts unsecured by deed of trust, mortgage or other lien on real or personal property, due or owing by the holders of such shares to bona fide residents of the State of California; alleges that heretofore, to wit; on or about the 23d day of March, 1900, respondent caused to be addressed and mailed to the stockholders of complainant, and to each of them who owned, claimed, possessed or controlled any shares of the capital stock of complainant at 12 o'clock M. of the first Monday in March, 1900, a written notice, notifying such stockholders, and each and all of them, of the intention of respondent to assess such stock to such stockholders, and requesting them to call at the office of respondent in the City Hall, in the City and County of San Francisco, State of California, and present such unsecured debts, due or owing to bona fide residents of the State of California or other exemptions as they might have, and which, under the laws of the United States and of the State of California, are deductible from the valuation of such shares of stock, that he might permit and make such deductions; alleges that in response to such notice and invitation, numerous stockholders of complainant's capital stock have made return, as required and permitted by section 3,629, of the Political Code, of unsecured debts owned by them on the 5th day of March, 1900, at 12 o'clock M., due and

owing to bona fide residents of the State of California; and have requested that such unsecured debts be deducted from that valuation of the shares of stock of complainant, which said deductions respondent is prepared to, and will, unless restrained by order of this Honorable Court, make and allow from the valuation of said shares of stock.

And respondent alleges he has no information or belief upon the subject sufficient to enable him to answer, and basing his denial on that ground, denies that the amount of moneyed capital in the City and County of San Francisco, State of California, on the first Monday in March, 1900, at noon of said day, invested by banks or bankers having their principal place of business in said City and County, or residents therein in unsecured solvents' credits, or from which, under the constitution and laws of this State unsecured debts can be deducted, was or is in the sum of $14,074,561 or any other sum, or any part thereof; denies that on the day and year last aforesaid the amount of moneyed capital in the State of California, other than in the City and County of San Francisco, invested by banks or bankers in unsecured solvent credits, of from which, under the constitution and laws of the State of California unsecured debts can be deducted, or otherwise, was the sum of $7,589,302 or any other sum, or any part thereof; denies that on the day and year last aforesaid said banks or bankers, at the City and County of San Francisco, had debts unsecured by trust deed, mortgage, or other lien on real or personal property, owing by such bank or bankers in said City and County, of San Francisco amounting to

the sum of $36,710,062, or any other amount, or any part thereof; denies that on said day last aforesaid the amount of debts unsecured by trust deed, mortgage, or other lien on real or personal property, owing by said bank or bankers, or otherwise, in the State of California, other than in the City and County of San Francisco, was the sum of $32,400,304, or any other sum, or any part thereof. And respondent denies that the amount of moneyed capital invested in such solvent credits by such bank or bankers on the day and year last aforesaid in the City and County of San Francisco or in the State of California, as compared with the amount of moneyed capital invested in the shares of the capital stock of complainant, or otherwise or at all, is so large and substantial, or large and substantial, that the assessment or taxation of the shares of the capital stock of complainant without deduction therefrom, or without being able to deduct therefrom, debts unsecured by trust deed mortgage or other lien on real or personal property, as may have been owing by the respective holders of the shares of the capital stock of complainant on the day and year last aforesaid, would or will be an illegal or unjust or illegal and unjust or any discrimination, or a discrimination at all against the owners or holders of the shares of the capital stock of complainant, or would or will make the taxation of said shares of stock, or any of them, at a greater rate or at any rate other than is imposed upon other moneyed capital in the hands of individual citizens in the State of California, or particularly in the City and County of San Francisco, State of California, And respondent denies that the solvent credits

hereinbefore referred to or any solvent credits so held as aforesaid by the banks or bankers in the City and County of San Francisco or in the State of California, are moneyed capital in the hands of individual citizens of the State of California which enter into competition for business, or otherwise, with complainant.

And in this behalf, respondent is informed and believes and upon such information and belief alleges the fact to be that the paid-up capital of commercial banks and trust companies engaged in the business of banking in the City and County of San Francisco, State of California, was, on the first Monday in March, 1900, at noon of said day, ever since has been, and now is, the sum of $9,899,615 and no more and that, the reserve fund, undivided profits and surplus fund of said commercial banks and trust companies on the day and year last aforesaid, aggregated the sum of $10,444,447, and no more, making a total of $20,344,062; that the market value of the shares of the capital stock of said commercial banks and trust companies, as bought and sold on the stock and bond exchange and in the open market on the day and year last aforesaid, was the sum of $23,325,246, and no more; that the said commercial banks and trust companies own and have invested in United States' bonds and other property exempt from taxation under the laws of the United States, and of the State of California the aggregate sum of $15,109,422, and no more; that said banks and trust companies are or will be assessed for real and personal property, including solvent credits, owned, claimed, possessed or controlled by them on the first Monday in March, 1900, at 12 o'clock M. of said day, in the sum of $14,794,628 or more.

And in this behalf, respondent further alleges that the commercial banks and trust companies, and such and all of them entering into competition for business with complainant in the City and County of San Francisco, and in the State of California were or will be assessed and taxed for the fiscal year ending June 30, 1901 at as great or greater a rate than is or will be imposed or assessed upon the shares of the capital stock of complainant.

XII.

And respondent denies that, in the making of the assessment of the shares of the capital stock of complainant, he will not proceed in the manner directed by the act of March 14, 1899, in this: That he will ascertain and determine the value of each of the shares of the capital stock of complainant to be the sum of $115,452, by dividing the sum total of the assets of complainant, consisting of $500,000 paid up capital, and $77,260 undivided profits, by 5,000, the number of shares of capital stock of complainant, and will deduct therefrom the sum of $11.10 per share, as the proportionate amount per share of the value of the United States bonds held by complainant to secure its circulation, and of its furniture, and will, as hereinbefore set out, assess to the stockholders the sum of $104.36 per share as the value of each share of complainant's capital stock subject to assessment and taxation under the provisions of the act of March 14, 1899; or that he will not proceed in the manner directed by said act, otherwise, or at all; but respondent admits that he will refuse to

make any other or further deductions from such ascertained values, in order to ascertain the assessable value of such shares; and respondent denies that the provisions of section 3609 of the Political Code of the State of California, he was or is required to deduct from the value of each share of the capital stock of complainant such sum as is in the same proportion to such value as the value of any other property owned, possessed, claimed or controlled by complainant at 12 o'clock M. on the 5th day of March, 1900; and denies that he is required by said section 3609, or any other section, or any law whatsoever, to make any further or other deduction from the value of said shares of the capital stock of complainant, proportional or otherwise, for or on account of any other or further property owned, claimed, possessed or controlled by complainant, as aforesaid; but respondent admits that, on the first Monday in March, 1900, at 12 o'clock M. of said day, complainant had not, and thence hitherto has not, nor has it now, any real estate; and that all the property of complainant consisted on said day and at said time, and has thence hitherto consisted, and does now consist, of its bonds, money on hand, credits, furniture, and other personal property, and at said time the same constituted and were the assets of complainant used and employed by it in the conduct and carrying on of its business as a national banking association under and by virtue of the provisions of the act of Congress of the United States known as the National Banking Act; but respondent denies that said personal property, or any thereof, was on said day or

at said time, or on any day, or at any time, exempt from assessment or taxation; and in this behalf respondent alleges the fact to be that said personal property assets, and said and all thereof, were, on said day and at said time, and ever since have been, and are now, constituent elements in the estimation of the value of the shares of the capital stock of complainant, on account of which the shareholders of complainant are entitled to no deduction, or deductions whatsoever. And respondent denies that, if deduction of all the property of complainant exempt from assessment or taxation were made to each shareholder in assessing said stock, there would remain nothing of value subject to assessment or taxation, or that assessment or taxation of said shares at said value of $104.36 per share, would be based wholly, or at all, upon supposed and fictitious, or supposed or fictitious property, or upon property exempt by the constitution or laws of the United States from assessment or taxation; and in this behalf respondent alleges that a full and entire deduction from the value of the shares of complainant will be permitted and made of the proportionate value per share of all property not included or permitted or required to be included by law in the estimation and determination of the value of said shares, and each of them, for purposes of assessment and taxation.

XIII.

And respondent admits that in and by section 5610 of said Political Code it is provided, that in case the tax on any stock in a national bank is unsecured by

real estate owned by the holder of such stock, then the bank in which said stock is held shall be liable therefore, and the assessor shall collect the same from said bank, which may charge the amount of the tax so collected to the account of the stockholders owning such stock; and shall have a lien prior to all other liens on said stock and the dividends and earnings thereof, for the reimbursement to it of the taxes so paid. Admits that the ownership of the shares of the capital stock of complainant, or of any of them, may and does change by the endorsement and transfer of the certificate representing a given number of said shares without there being any change in the name or names in which the said certificate or certificates stand on the books of complainant.

Admits that while the shares of stock of complainant on the first Monday in March, 1900, M. of said day, may have been owned as the same appear upon the books of complainant, or as the names of the owners thereof appear in the list of stockholders kept by complainant, yet intermediate that day and the day when respondent may call upon or demand payment of complainant of the taxes to be levied, should respondent ever call upon or demand payment of such taxes from complainant, the ownership of said shares of stock may have been changed; but respondent denies that, while complainant may have known who the owners of said shares of stock were on the first Monday in March, 1900, M. of that day, at the time a demand upon complainant for payment of such tax may be made, complainant may or will be wholly or otherwise unable to discover

who are the owners of the same, or to whose account the amount of such tax so paid will or can be charged, and in this behalf respondent is informed and believes, and upon such information and belief charges the fact to be, that the shares of the capital stock of complainant standing on the books of complainant in the names of certain persons as aforesaid, at 12 o'clock M. on the first Monday in March, 1900, were actually owned, claimed, belonging to, in the possession or under the control of such person or persons, on said day and at said time, and that the same ever since said day and hour have been, and now are, owned, claimed, belonging to, in the possession of, or under the control of, the same person or persons in whose name or names the said shares appeared upon the books of complainant, as aforesaid.

And respondent denies that, should complainant be compelled to pay a or any tax upon its shareholders, as provided in section 3610 of the Political Code, it would be impossible for complainant to charge the amount of such tax to the accounts of the respective stockholders on any such shares of stock; inasmuch as complainant be wholly or otherwise unable to know who were the real owners of such shares of stock, or of any of them, or who or what shareholders were legally liable for the amount of such tax; and denies that, by reason of any such payment, such tax, or any part thereof, would be irretrievably, or otherwise, or at all, lost to complainant.

And respondent denies that, if complainant should pay the amount of such tax and should attempt to

charge the proportionate amount thereof to the persons in whose names the said shares of stock stood on the first Monday in March, 1900, at noon of said day, or at any other time, on the books of complainant, according to the number of shares standing in the name of each person, complainant would be subjected to, or would be harassed by,a great or any multiplicity of suits, or by any suits whatsoever, by or on behalf or at the instance of several, or any, stockholders of complainant. And respondent denies that any one or more of said stockholders would have the right of resisting or contesting the payment of any tax on any share or shares of the capital stock of complainant owned by such stockholders, or would have the right to show that at 12 o'clock M. of the first Monday in March, 1900, he was not legally liable therefor, or that complainant had made payment of said tax in its own wrong, or otherwise, in case it should pay the same; denies that in case it should result that complainant had made illegal payment of said tax, such illegal payment would constitute a breach of trust, or illegal division of the corporate assets of complainant from the trust upon which it holds the same for the benefit of its creditors or stockholders.

XIV.

And respondent denies that he has threatened the seizure or sale, or does now threaten the seizure or sale of any personal or other property belonging to complainant sufficient to raise the sum of $3,019.39, or any other sum, or any part thereof; and denies if

such seizure or sale should be made, such seizure or sale would deprive complainant of its property without due process of law; and respondent denies that such a seizure and sale would be contrary to, or in violation, or repugnant to, the rights or privileges of complainant under or pursuant to the provisions of the constitution or laws of the United States, or under or pursuant to the provisions of the constitution or the laws of the State of California, or particularly under or pursuant to the provisions of section 1 article XIV of the Constitution of the United States, known as the National Bank Act, or under or pursuant to the provisions of section 1 of article XIII of the constitution of the State of California; or under or pursuant to the provisions of section 3608 of the Political Code of the State of California, as the same existed at 12 o'clock M. on the first Monday in March, 1900, or that the act of the legislature of the State of California of March 14, 1899, under or pursuant to which the respondent might act in making said assessment and taxation, or making such seizure or sale, is in violation of or repugnant to the rights or privileges of complainant under or pursuant to the provisions of the constitution or law of the United States, or particularly under or pursuant to the provisions of section 1, article XIV, of the Constitution of the United States, or under or pursuant to the provisions of the act of Congress of the United States known as the National Bank Act, or any or all of such laws, constitutions, or provisions, or otherwise, or at all.

And respondent denies that, under the provisions of

said act of March 14, 1899, complainant would be protected only in paying the taxes of the stockholder or stockholders who owned stock of complainant at 12 o'clock M. on said first Monday in March, 1900, and who did not own real estate to secure the payment of the same, or would not be protected in paying said tax, or any part thereof, where, at the time of such payment by complainant, such shares had theretofore actually changed in ownership and had become the property of any person or persons other than or different from those persons owning it at 12 o'clock M. of said first Monday in March, 1900, or had become the property of any person or persons who at the time of such payment by complainant might own real estate to secure the payment of the tax on such shares of stock. And respondent denies that, by reason of all or any of such supposed or pretended facts complainant would be involved in great or any doubt or uncertainty as to its rights or duties in the premises, or otherwise, or would be exposed to a great or any multiplicity of litigation, or any litigation, to the loss or detriment, or otherwise, of all or any nondelinquent stockholders of complainant.

XV.

And respondent denies that this is a suit in equity of a civil nature, and in this behalf respondent alleges that the subject matter of said bill of complaint is not within the jurisdiction of a court of equity, or cognizable therein.

XVI.

And respondent further submits to this Honorable Court that complainant has a full, complete, speedy

and adequate remedy at law against respondent for all causes of action or causes of actions, stated or attempted to be stated in complainant's bill of complaint on file in this action; and he here claims the same benefit of the objection as if he had not demurred to the relief so sought.

Wherefore, this respondent having fully answered, confessed, traversed, and avoided or denied all the matters in the said bill of complaint material to be answered according to his best knowledge and belief, humbly prays this Honorable Court to enter its decree, that the respondent be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained, and for such further and other relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

WASHINGTON DODGE,
As Assessor of the City and County of San Francisco.
Respondent.

FRANKLIN K. LANE,
Solicitor for Respondent.

State of California,
City and County of San Francisco. } ss.

Washington Dodge, as Assessor of the City and County of San Francisco, State of California, respondent in the above-entitled proceeding, being first duly sworn, says: That he is the respondent in the above-entitled action; that he has read the foregoing answer in said action, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

WASHINGTON DODGE.

Subscribed and sworn to before me, this 2d day of June, 1900.

J. M. SEAWELL,
Judge of the Superior Court of the City and County of San Francisco, State of California.

[Endorsed]: Answer to Bill of Complaint.

Service by copy of within original is hereby admitted this 4th day of June, 1900.

E. S. PILLSBURY,
ALFRED SUTRO,
Solicitors for Complainant.

Filed June 4th, 1900. Southard Hoffman, Clerk.

*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California,
Respondent.
No. 12,928.

## Replication.

The replication of The San Francisco National Bank, a national banking association, complainant, to the answer of Washington Dodge, as Assessor of the City and County of San Francisco, State of California, respondent.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said respondent is uncertain, untrue and insufficient to be replied unto

by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All of which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct; and humbly prays as in and by its said bill it hath already prayed.

E. S. PILLSBURY,
Solicitor for Complainant.

ALFRED SUTRO,
Of Counsel.

[Endorsed]: Replication.

Service of within replication admitted this 11th day of June, 1900.

FRANKLIN K. LANE,
City Attorney,
Solicitor for Respondent.

Filed June 11, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),

Complainant,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco,

Respondent.

## Supplemental Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Northern Circuit of California, in the Ninth Circuit, Sitting in Equity:

The San Francisco National Bank, a national banking association, organized and existing under and by virtue of the laws of the United States, brings and files its supplemental bill of complaint against Washington Dodge, as Assessor of the City and County of San Francisco, State of California, and thereupon humbly complaining, your orator shows your Honors as follows:

That your orator filed its original bill of complaint against the respondent in this court on the 25th day of April, 1900, wherein it prayed that the respondent be enjoined and restrained from making any assessment or

taxation upon the or any of the shares of the capital stock of your orator, and from listing the said assessment, or any share or shares of the capital stock of your orator in the assessment-book prepared or to be prepared by the respondent for the fiscal year ending June 30th, 1901, and from making any seizure or sale of any property of your orator, or from in any manner interfering with the shares of the capital stock, or with the property of your orator, or from instituting any suit or suits, action or actions, against your orator for the collection of any taxes claimed to be due on any assessment upon any share or shares of the capital stock of your orator.

That, upon the filing of the said bill of complaint, a preliminary restraining order was granted by the Honorable, the above-entitled Court, restraining the said respondent from making the said threatened assessment and from collecting any tax or taxes on any share or shares of the capital stock of your orator; that thereupon the respondent filed his answer to the said bill of complaint, and that thereupon the complainant replied thereto; that thereupon the matter of the said restraining order was submitted to the Honorable, the above-entitled Court for its consideration and decision, and that, after having considered the same, the said Court dissolved the said restraining order to the extent of permitting the said respondent to make an assessment of the shares of the capital stock of your orator.

That thereafter, to wit, on or about the 29th day of June, 1900, the said respondent made an assessment of each share of the capital stock of your orator at a val-

uation of $104.36 per share, as in the original bill herein averred, and did, on or about the said 29th day of June, 1900, notify and inform your orator, and did threaten your orator that he, the said respondent, would, on Monday, the 2d day of July, 1900, demand from your orator the sum of two thousand and seventy-one and 58-100 dollars ($2,071.58) as and for the tax on 1217 shares of the capital stock of your orator, the said tax on the said 1217 shares of the capital stock of your orator being unsecured by real estate owned by the holders of said 1217 shares of stock, and that if said sum of $2,071.58 should not be paid on demand on said 2d day of July, 1900, by your orator, the said respondent would collect said sum from your orator by seizure and sale of personal property of your orator sufficient to raise said sum of $2,071.58.

That the assessment so made by respondent and the said taxes are the same as charged in the original bill herein as threatened to be made and levied; and the said assessment and the said taxes are subject to the same objections and the like charges of illegality as in said original bill alleged in regard to the assessment and taxes therein stated as threatened to be made and levied; and your orator hereby avers that all and singular the averments in said original bill contained in respect to said threatened assessment and taxes are hereby made in respect to the said assessment so made, and said taxes so threatened to be collected, as if herein fully incorporated and set forth.

That your orator does not intend to and will not pay the said sum of $2,071.58, or any part thereof, and that

the said respondent, unless restrained by the order of this Honorable Court, will make the said seizure and sale of the property of your orator, sufficient to raise the said sum of $2,071.58, to the great and irreparable loss of your orator, as is more fully set forth in the original bill of complaint herein.

In consideration whereof, and forasmuch as your orator is remediless in the premises under the strict rules of the common law, and can have relief only in a court of equity, where matters of this sort are properly cognizable and relievable your orator prays that an injunction may issue out of this Court restraining and enjoining the said respondent from making any collection of any tax on any share of the capital stock of The San Francisco National Bank the complainant herein for the fiscal year ending June 30th, 1901, and from making the collection of the said sum of two thousand and seventy-one and 58-100 dollars ($2,071.58), or any part thereof, as and for the tax claimed to be due on twelve hundred and seventeen (1217) shares of the capital stock of The San Francisco National Bank, the complainant herein, for the fiscal year ending June 30th, 1901, as alleged herein, and from seizing or selling any property of said complainant in satisfaction of any tax upon any share of the capital stock of The San Francisco National Bank, based upon any assessment of the shares of the capital stock of The San Francisco National Bank made by the respondent for the fiscal year ending June 30th, 1901, and from instituting any suit or suits, action or actions, against said complainant for the collection of any such tax, or for the collection of said sum of $2,071.58, or any

part thereof, and from in any manner interfering with, or molesting, said complainant, or disturbing it in the possession of its property, by reason of or looking to obtainment of payment or satisfaction of any tax on any share of its capital stock, or of said sum of $2,071.58, or any part thereof; and your orator prays that in the meantime, and until the hearing hereof, a preliminary restraining order and injunction pendente lite, embracing all of the relief herein prayed for, issue out of this Honorable Court, directed to the said respondent, such preliminary restraining order and injunction to continue in force until the determination of the final hearing herein, and that upon the final hearing of this cause, this Court do adjudge and declare said assessment and the said taxes illegal and void, and forever enjoin said respondent from collecting said sum of $2,071.58, or any part thereof, or any other sum as and for taxes upon any share or shares of the capital stock of your orator; and that your orator may have the injunction herein prayed for made perpetual, and that your orator may have such other and further relief as this cause may require, as well as its costs.

May it please your Honors to grant unto your orator a writ or writs of subpoena, to be issued out of and under the seal of this Honorable Court, and directed to said respondent, Washington Dodge, as Assessor of said City and County of San Francisco, commanding said respondent to appear in this cause at some day certain to be named therein, and to answer in the premises, but not under oath, answer under oath being expressly waived,

and to abide by and perform such decree as may be rendered herein.

THE SAN FRANCISCO NATIONAL BANK,
[Seal.] By JAMES K. WILSON, President,
Complainant.

E. S. PILLSBURY,
Solicitor for Complainant.
ALFRED SUTRO,
Of Counsel.

Northern District of California,
State of California, } ss.
City and County of San Francisco.

J. K. Wilson, being first duly sworn, says: That he is, and always has been, the president of The San Francisco National Bank, the complainant above named; that he has read the foregoing supplemental bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon information or belief, and as to those matters that he believes it to be true; and, further, that the seal affixed to said bill is the corporate seal of the complainant and was affixed to said bill by him, and the name of said complainant was signed by him to said bill, by authority of said complainant.

JAMES K. WILSON.

Subscribed and sworn to before me this 2d day of July, A. D. 1900.

[Seal] E. H. THARP,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Supplemental Bill. Filed July 2, 1900. Southard Hoffman, Clerk.

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## Subpoena Ad Respondendum on Supplemental Bill of Complaint.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.*

IN EQUITY.

The President of the United States of America, Greeting, to Washington Dodge, as Assessor of the City and County of San Francisco:

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco on the sixth day of August, A. D. 1900, to answer a supplemental bill of complaint exhibited against you in said court by The San Francisco National Bank, a national banking association, organized and existing under and by virtue of the laws of the United States, and to do and receive what what the said Court shall have considered in that behalf. And this your are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 2d day of July, in the year of our Lord one thousand nine hundred, and of our independence the 124th.

SOUTHARD HOFFMAN,
Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of August next, at the clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: United States Marshal's Office, Northern District of California.

I hereby return that I received the within writ on the 3d day of July, 1900, and personally served the same on the 5th day of July, 1900, on Washington Dodge, as Assessor of the City and County of San Francisco, by delivering to and leaving with Washington Dodge, as Assessor of said City and County said defendant named

therein, at the City and County of San Francisco, in said District, an attested copy thereof.

San Francisco, July 5, 1900.

JOHN H. SHINE,
United States Marshal.
By E. A. Morse,
Office Deputy.

Filed July 7, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

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*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK,
Complainant,
vs.
WASHINGTON DODGE, as Assessor etc.,
Respondent.

**Answer to Supplemental Bill of Complaint.**

The answer of Washington Dodge, as Assessor of the City and County of San Francisco, State of California, respondent in the supplemental bill of complaint entitled "The San Francisco National Bank, Complainant, v. Washington Dodge, as Assessor of the City and County of San Francisco, Respondent."

This respondent now, and at all times thereafter, saving to himself all, and all manner of benefit of exception

or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said supplemental bill of complaint contained, for answer thereto, or to as much thereof as this respondent is advised, it is material or necessary for him to make answer to, answering says:

I.

And admits that complainant filed its original bill of complaint against the respondent in the court on the 25th day of April, 1900, wherein it prayed that the respondent be enjoined and restrained from making any assessment or taxation upon the shares of the capital stock of complainant,, and from listing the said assessment in the assessment-book prepared, or to be prepared, by respondent for the fiscal year ending June 30, 1900, and from making any seizure or sale of any property of complainant, or from in any manner interfering with the shares of the capital stock, or with the property of complainant, or from instituting any suit or suits, action or actions, against complainant for the collection of any taxes due on said assessment upon any of the shares of the capital stock of complainant.

II.

And admits that upon the filing of the said bill of complaint a preliminary restraining order was granted by the Honorable, the above-entitled Court, restraining the respondent from making the said assessment, and from collecting any taxes on any shares of the capital stock of the complainant; and admits and alleges that thereupon the respondent filed his answer to the said

bill of complaint, and that thereupon the complainant replied thereto; and admits that thereupon the matter of the said restraining order was submitted to the Honorable, the above-entitled Court, for its consideration and determination, and that after having considered the same, the Court dissolved the restraining order.

III.

And respondent admits that thereafter, to wit, on or about the 29th day of June, 1900, respondent made an assessment of each share of the capital stock of complainant at a valuation of $104.36 per share, and did, on or about the 29th day of June, 1900, notify and inform complainant that he would, on Monday, the 2d day of July, 1900, demand from complainant the sum of $2,071.58, as and for the tax on 1217 shares of the capital stock of the complainant, the tax on the said 1217 shares of the capital stock of the complainant being unsecured by real estate owned by the holders of the said 1217 shares of stock; and that if said sum of $2,071.58 should not be paid on demand on said 2d day of July, 1900, by complainant, respondent would collect said sum from complainant by seizure and sale of personal property of complainant sufficient to raise said sum of $2,071.58.

IV.

But respondent denies that the assessment so made is subject to the same or any objection, or to the like or any charges of illegality, as in said original bill, or otherwise alleged in regard to the assessment therein stated as threatened to be made; and respondent prays

that all and singular the allegations in said original bill of complaint contained in respect to the illegality or unconstitutionality of said threatened assessment may be taken to be herein repeated and denied with respect to said assessment so actually made by respondent with a like force and effect as if the denials and averments in respondent's answer to said original bill of complainant contained in this behalf were herein repeated in full in respect to said assessment so actually made.

V.

And respondent denies that unless restrained by the order of this Honorable Court, or otherwise, he will make seizure and sale of the property of complainant, to the great or irreparable loss of complainant, as set forth in said original bill of complaint heretofore filed herein, or otherwise or at all.

VI.

And in this behalf the respondent alleges the facts to be that, under and by virtue of the constitution and laws of the State of California, and especially of section 3628 of the Political Code of said State, respondent is commanded and required, between the first Mondays in March and July of each year, in the discharge of his duties as Assessor of the City and County of San Francisco, to ascertain the names of all taxable inhabitants, and all the property in the county subject to taxation, and to assess the same to the persons by whom it was owned or claimed, or in whose possession or control it was on the first Monday of March next preceding; that,

under and in accordance with the provisions of sections 3620 and 3621 of the Political Code of said State, respondent is commanded and required, at the time of the assessment of property as aforesaid, to collect the taxes on all property when, in his opinion, such taxes are not a lien upon real estate sufficient to secure the payment of the same; that such collection may be made by seizure and sale of any personal property owned by the person against whom the tax is assessed at the time of making the assessment, or at any time before the third Monday in July of each year, and not otherwise, or at any other time; that such collections can be made only upon receipts furnished respondent by the Auditor of the City and County of San Francisco, which receipts such Auditor is authorized and required to furnish under and in accordance with section 3738 of the Political Code of said State, and under and by the provisions of said section of said code respondent is required to return all unused receipts to such Auditor on the first Monday in August in each year; that the time during which respondent is authorized and empowered to make such collections, and especially the collection of the personal property taxes assessed against the shares of complainant, has heretofore, to wit, on the third Monday of July, 1900, wholly expired and terminated, and respondent is without any present or future power or authority to collect by seizure and sale or otherwise, or to receive or receipt for any of said taxes so assessed as aforesaid.

VII.

And respondent further admits to this Honorable Court that complainant has a full, complete, speedy,

and adequate remedy at law against respondent for all causes of action, or causes of actions stated, or attempted to be stated in complainant's supplemental bill of complaint on file in this action; and he here claims the same benefits of the objection as if he had not demurred to the relief so sought.

Wherefore, this respondent having fully answered, confessed, traversed, and avoided and denied all the matters in the said supplemental bill of complaint material to be answered, according to his best knowledge and belief humbly prays this Honorable Court to enter its decree, that the respondent be hence dismissed, with his reasonable costs and charges in this behalf in the premises as to this Honorable Court may seem meet and in accordance with equity.

WASHINGTON DODGE,
Assessor of the City and County of San Francisco, Respondent.

FRANKLIN K. LANE,
Solicitor for the City and County of San Francisco, Respondent.

I hereby certify that, in my opinion, the foregoing answer is well founded in point of law.

W. S. BROLECK.

[Endorsed]: Service by copy of the within original is hereby admitted this 26th day of September, A. D. 1900.

E. S. PILLSBURY,
Solicitor for Complainant.

Filed September 26, 1900. Southard Hoffman, Clerk. By W. B. Bealzley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California,
Respondent.
No. 12,928.

**Replication to Supplemental Bill of Complaint.**

The replication of The San Francisco National Bank, a national banking association, complainant, to the answer of Washington Dodge, as Assessor of the City and County of San Francisco, State of California, respondent, to the supplemental bill of complaint herein.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer to the said supplemental bill of complaint for replication thereunto, saith that it will aver and prove its said supplemental bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said respondent is uncertain, untrue and insufficient to be replied unto by

this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All of which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct, and humbly prays as in and by its said supplemental bill it hath already prayed.

E. S. PILLSBURY,
Solicitor for Complainant.

ALFRED SUTRO,
Of Counsel.

[Endorsed]: Service of within replication admitted this 28th day of September, 1900.

FRANKLIN K. LANE,
Solicitor for Respondent.

Filed October 1, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1901, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 20th day of January, in the year of our Lord one thousand nine hundred and two. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

THE SAN FRANCISCO NATIONAL BANK,

vs.

WASHINGTON DODGE, as Assessor, etc.,

No. 12,928.

**Order Denying Application for Injunction and Dismissing Bill of Complaint.**

Complainant's application for injunction pendente lite herein having been heard and submitted, and the cause having also been heard and submitted upon the pleadings, and an agreed statement of facts filed, and the same having been fully considered, it is now ordered that said application for injunction be and hereby is denied; that the restraining order heretofore issued herein be discharged; that complainant's bill and supplemental bill herein be and hereby are dismissed, and that defendant have a decree against complainant for his costs.

*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK,
Complainant,
vs.
WASHINGTON DODGE, as Assessor, etc.,
Defendant.
No. 12,928.

## Enrollment.

The complainant filed its bill of complaint herein on the 25th day of April, 1900, which is hereto annexed.

A subpoena to appear and answer in said cause was thereupon issued, returnable on the 4th day of June, A. D. 1900, which is hereto annexed.

The defendant appeared herein on the 31st day of May, 1900, by Franklin K. Lane, Esq., his solicitor.

On the 4th day of June, 1900, an answer was filed herein, which is hereto annexed.

On the 11th day of June, 1900, a replication to said answer was filed herein, and is hereto annexed.

On the 2d day of July, 1900, by leave of the Court, a supplemental bill was filed herein, and is hereto annexed.

A subpoena to appear and answer said supplemental bill was issued on the 2d day of July, 1900, returnable the 6th day of August, 1900, which is hereto annexed.

An answer to said supplemental bill was filed herein on the 26th day of September, 1900, and is hereto annexed.

A replication to said answer was filed herein on the 1st day of October, 1900, and is hereto annexed.

On the 20th day of January, 1902, an order denying application for injunction and dismissing bill was made and entered herein, a copy of which is hereto annexed.

Thereafter, and on the 26th day of May, 1902, a final decree was signed, filed and entered herein, in the words and figures following, viz:

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At a stated term, to wit, the March Term, A. D. 1902, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the twenty-sixth day of May, in the year of our Lord one thousand nine hundred and two. Present: WILLIAM W. MORROW, Circuit Judge.

THE SAN FRANCISCO NATIONAL BANK (A National Bank Association),
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, et al.,
Defendants.
No 12,925

## Final Decree.

This cause came on to be heard at the November term, A. D. 1901, and was argued by counsel and submitted to the Court for consideration and decision; whereupon, on consideration thereof, it is ordered, adjudged, and decreed, that complainant's bill of complaint and supplemental bill of complaint herein be, and the same hereby are, dismissed, and that defendants herein recover from complainant their costs herein expended, taxed at $29.90.

Dated San Francisco, Cal. May 26, A. D. 1902.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Final Decree. Filed and entered May 26th, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit, Northern District of California.*

SAN FRANCISCO NATIONAL BANK, Complainant,

vs.

WASHINGTON DODGE, Assessor, etc., Respondent.

**Memorandum of Costs and Disbursements.**

| | |
|---|---|
| Clerk's fees ..... ..... ..... | $ 9.90 |
| Docket fee..... ..... ..... | 20.00 |
| Total | $29.90 |

January 25, 1902. No appearance. Costs taxed at $29.90.

SOUTHARD HOFFMAN,
Clerk.

United States of America,
Northern District of California, } ss.
City and County of San Francisco.

W. I. Brobeck, being duly sworn, deposes and says: That he is one of the attorneys for the respondent in the above-entitled cause, and as such is better informed rela-

tive to the above costs and disbursements than the said respondent. That the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

W. I. BROBECK.

Subscribed and sworn to before me this 22d day of January A. D. 1902.

[Seal] J. J. GREIF,
Deputy County Clerk.

To Messrs. E. S. Pillsbury and Alfred Sutro, Attorneys for Complainant.

You will please take notice that on Saturday, the 25th day of January, A. D. 1902, at the hour of 11 o'clock A. M., I will apply to the clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said court, in such case made and provided.

FRANKLIN K. LANE,
Attorney for Respondent.

Service of within memorandum of costs and disbursements, and receipt of a copy thereof, acknowledged this 22d day of January, A. D. 1902.

E. S. PILLSBURY,
ALFRED SUTRO,
Attorneys for Complainants.

[Endorsed]: Filed this 22d day of January, A. D. 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

## Certificate to Enrollment.

Whereupon, said pleadings, subpoenas, copy of order, a final decree, and a memorandum of taxed costs, are hereto annexed; said final decree being duly signed, filed, and enrolled, pursuant to the practice of said Circuit Court.

Attest my hand and the seal of said Circuit Court this 26th day of May, 1902.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Enrolled Papers. Filed May 26th, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

IN EQUITY.

THE SAN FRANCISCO NATIONAL BANK,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California,
Respondent.
No. 12,928.

Monday, June 25, 1900.

**Opinion on Application for an Injunction Pendente Lite.**

E. S. PILLSBURY and ALFRED SUTRO, Solicitors for Complainant.

FRANKLIN K. LANE, City Attorney, for Respondent.

MORROW, Circuit Judge.—This is an application on the part of the complainant for an injunction pendente lite, restraining and enjoining the defendant, as Assessor of the City and County of San Francisco, from making an assessment upon the shares of the capital stock of the complainant for the fiscal year ending June 30, 1901.

This Court is of the opinion that a temporary injunction should not issue to restrain the assessor from making the assessment described in the bill in this case. That officer should be permitted to determine the elements and to make an official record of the amount of the taxes he deems the complainant liable to under the statute. The issues raised by the allegations of the bill and the admissions and denials of the answer as to the elements and the amount of the taxes, ought to be fully determined while the Assessor has the authority to act. Moreover, when this amount is fixed, the controversy is clearly defined once for all; and if the tax is finally sustained, the principal sum upon which interest and costs and other liabilities may accrue may have been determined, so that the city and county may not suffer any loss by reason of this action to determine the legality of the taxes.

A preliminary injunction will therefore be denied and the pending restraining order be dissolved; without prejudice, however, to the right of the complainant upon a supplemental bill or other pleading to apply for an injunction, if so advised, to restrain the Assessor from collecting the tax after an assessment has been made, if one is made; and this order is made upon the condition that the complainant shall have the opportunity of making such an application to the Court before the collection of the tax is enforced or attempted to be enforced by the defendant.

[Endorsed]: Filed June 25, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK a National Banking Association),

Complainant,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California,

Respondent.

No. 12,928.

## Agreed Facts.

It is hereby stipulated and agreed by and between the respective parties to the above-entitled action, that upon the hearing or any further proceeding that may be had in the above-entitled cause the following facts shall be deemed and taken to be true for the purposes thereof; subject, however, to objections to their relevancy, competency, or materiality, that is to say—

I.

The facts stated in paragraphs first, second, third, fourth, fifth, sixth, seventh, and tenth of the original bill of complaint in the above-entitled cause are true.

That on the first Monday in March, 1900, to wit, on March 5, 1900, at 12 o'clock M. of said day, complainant did not own any real estate, either in the city and county of San Francisco, State of California, or elsewhere.

That on the first Monday in March, 1900, to wit, on March 5, 1900, at 12 o'clock M. of said day, complainant owned, possessed, and controlled the following personal property, and none other: $50,000 of bonds of the United States; the premium on said bonds having on said day at said time been the sum of $4,800, making the said $50,000 of United States bonds with premium thereon, equal to the sum of $54,800; $175,784 in cash; furniture of the value of $5,450; solvent credits over and above the debts due and owing by complainant, amounting to the sum of $343,663.32; redemption fund, $2,250; a correct statement of the entire assets and liabilities of said San Francisco National Bank, on the first Monday in March, 1900, at twelve o'clock M. of said day, being in the words and figures following:

RESOURCES.

| | |
|---|---|
| Loans and Discounts | $1,382,330.39 |
| U. S. Bonds | 50,000.00 |
| Overdrafts | 4,293.26 |
| Premiums on U. S. bonds | 4,800.00 |
| Cash on hand and due from banks | 390,915.13 |
| Redemption fund (5% of circulation) | 2,250.00 |
| Total | $1,840,038.78 |

LIABILITIES.

| | |
|---|---|
| Capital stock paid in | $ 500,000.00 |
| Undivided profits | 81,911.32 |
| Deposits | 1,258,127.46 |
| Total | $1,840,038.78 |

II.

That there are 1217 shares of the capital stock of complainant the tax on which is unsecured by real estate owned by the holders thereof. That the said taxes on 1217 shares, at the said rate of $1.63 on each one hundred dollars' valuation, as specified in paragraph sixth of said original bill of complaint, and at the said valuation of $104.36, per share, as specified in paragraph tenth of said original bill of complaint, amount to the sum of $2,071.58.

III.

That the tabular statement hereto annexed, marked Exhibit "A," which is hereby referred to and made part hereof, truly and correctly shows the financial condition of the commercial banks of California at the close of business on the 5th day of March, A. D. 1900, at twelve o'clock M. of said day, as reported to the Bank Commissioners of the State of California, organized and acting under that certain act of the legislature of the State of California, entitled, "An act creating a Board of Bank Commissioners and prescribing their duties and powers, approved March 30, 1878; and the several acts of the legislature of said State of California amendatory thereof and supplementary thereto." That said commercial banks were and are corporations organized and acting under the laws of the State of California, and were and are citizens of the State of California, and are assessed and pay taxes in the manner and form prescribed by the laws of the State of California; and that the solvent credits owned and held by said banks on said first Mon-

day in March, 1900, were and are, moneyed capital in the hands of individual citizens of the State of California, to wit, said corporation, which enters into competition in business with complainant. The said banks and said property were so assessed and taxed for the fiscal year ending June 30th, 1901, and the franchises of said commercial banks and trust companies were also assessed to such companies.

That the manner in which the franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30th, 1901, by the Assessor of the city and county of San Frascisco, is illustrated by the case of The Bank of California, a banking corporation organized under the laws of the State of California, and which on said 5th day of March, 1900, had and now has its principal place of business in the said city and county of San Francisco. On the 5th day of March, 1900, the resources of The Bank of California were as follows:

| | |
|---|---|
| Bank premises | $ 250,000.00 |
| Real estate taken for debt | 293,629.27 |
| U. S. Bonds | 1,203,380.95 |
| Stocks and bonds of California corporations | 1,273,118.86 |
| Furniture | 1,000.00 |
| Library | 500.00 |
| Typewriter | 50.00 |
| Money on hand | 2,135,224.00 |
| Total | $5,906,403.08 |

That the market value of the stock of The Bank of California on said 5th day of March, 1900, was $405 per share, and that on said day there were issued and out-

standing twenty thousand shares of the capital stock of said bank. That the Assessor of said city and county assessed to The Bank of California for the fiscal year ending June 30th, 1901, the following property as held and owned by The Bank of California at twelve o'clock M. on March 5th, 1900.

| | |
|---|---|
| Real estate | $ 105,000 |
| Improvements thereon | 70,000 |
| Furniture | 1,000. |
| Library | 500 |
| Money | 2,135,224 |
| Typewriter | 50 |
| Franchise | 750,000 |
| Total | $3,061,774 |

That on the first Monday in March, 1900, there were shares of stock in banking corporations amounting to the sum of $30,000,000 in said State.

That the ownership of the shares of stock of complainant may and does change by endorsement and transfer of the certificate or certificates evidencing and representing any given number of shares, without there being any change in the name or names in which the said certificate or certificates stand upon the books of complainant; and ownership thereof may and does change intermediate twelve o'clock noon of the first Monday in March, annually, and the time of the making of the assessment by the Assessor of said City and County of San Francisco as required by law. That said bill of complaint correctly states the number of stockholders and shareholders of complainant as herein alleged.

IV.

That on June 30, A. D. 1900, said Washington Dodge, as Assessor as aforesaid, did make and complete his assessment-book in manner aforesaid, and therein did assess the stock of complainant in manner aforesaid and set down therein the tax on said 1,217 shares at the sum of $2,071.58; payment of which sum of money he, said Assessor, did on June 30, A. D. 1900, demand of complainant in said City and County of San Francisco, and did then and there inform complainant that if payment of the same were not made to him, he would proceed to collect and enforce collection and payment of the same as alleged in the supplemental bill of complaint in the above-entitled cause; and the assessment of the capital stock of complainant in said supplemental bill of complaint alleged and in the answer to said supplemental bill alleged, was made in the mode and manner hereinbefore described, and the same constitutes the assessment of the capital stock of complainant for the fiscal year ending June 30, 1901.

V.

That theretofore, to wit, on the 23d day of March, 1900, and before the assessment of said shares of stock of complainant, respondent caused to be addressed and mailed to the shareholders of complainant, and each of them who owned, claimed, possessed or controlled any

share of the capital stock of complainant, at twelve o'clock noon on the first Monday in March, 1900, a written notice. That such notices were as follows, to wit:

"San Francisco, March 23, 1900.

John Smith, 498 Montgomery St.

Dear Sir: As you are the owner of National Bank stock, you will be assessed as authorized by law as follows:

Shares of the First National Bank, S. F.

50 shares of the S. F. National Bank, S. F., $5218

Shares of the Nevada National Bank, S. F.

Shares of the Crocker-Woolworth Nat. Bank, S. F.

The assessment will be attached to any real estate you may own in the city and county. If you are not the owner of any realty, such steps for the immediate collection of the tax, as authorized by law will be taken.

If you have any exemptions or reductions allowed by law, please call at the Assessor's office, City Hall, San Francisco, and present them within ten days from the date hereof.

Respectfully,

WASHINGTON DODGE,

Assessor."

That in response to such notice and invitation or request, the said shareholders of complainant did not, nor did any one of them, make any return or statement, or

avail themselves of such invitation or request, of any debts unsecured by trust deed, mortgage or other lien on real or personal property due or owing by them, or any of them, to bona fide residents of the State of California.

That the complainant did not, nor did any officer or agent thereof, make or return a statement of any debts due or owing by such complainant, unsecured by trust deed, mortgage, or other lien on real or personal property, to bona fide residents of the State of California, nor did complainant, or any officer or agent of complainant ask or request such reduction or deduction whatsoever.

FRANKLIN K. LANE,

Attorney and Solicitor for Respondent.

E. S. PILLSBURY,

Attorney and Solicitor for Complainant.

W. S. WOOD,

ALFRED SUTRO,

Of Counsel.

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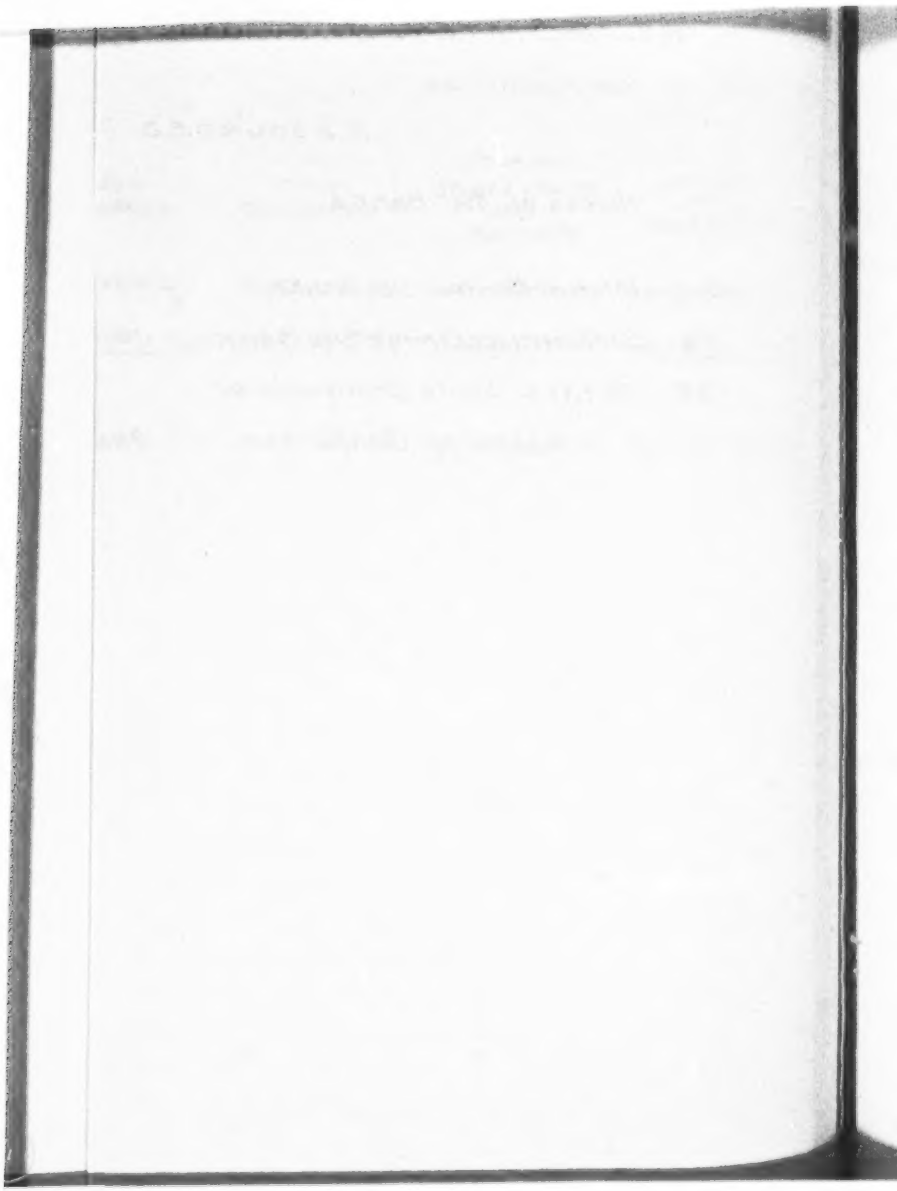

*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK (A National Banking Association),
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco,
Respondent.
No. 12,928.

**Petition for Appeal.**

To the Honorable, the Circuit Court Above Named:

Your petitioner, the complainant in the above-entitled cause, represents that there is manifest error committed to the injury of petitioner in the final decree pronounced in this case against it in favor of the respondent therein, filed and entered herein on the 26th day of May, 1902, and your petitioner is entitled to an appeal herein.

Wherefore, your petitioner, considering itself aggrieved by the decision of this Honorable Court, prays for an appeal from said final decree to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner herewith files its bond in the penal sum of $500, which bond is approved by the Honorable J. J. De Haven, one of the Judges of this Court, and ap-

pellant also files its assignment of errors with its petition.

W. S. WOOD,
E. S. PILLSBURY,
ALFRED SUTRO,
Solicitors for Complainant and Appellant.

[Endorsed]: Service of the within Petition for Appeal, by copy, admitted this 25th day of November, A. D. 1902.

FRANLIN K. LANE,
Per ASHER,
Attorney for Respondent.

Filed November 25, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

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*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK (A National Banking Association),
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco,
Respondent.
No. 12,928.

## Assignment of Errors.

Now comes The San Francisco National Bank, the complainant in the above-entitled cause, and makes the

following assignment of errors in the decree of the Circuit Court herein, namely:

First.—The Court erred in granting the decree entered in the above-entitled cause on the 26th day of May, 1902.

Second.—The Court erred in adjudging and decreeing that that certain act of the legislature of the State of California in the bill of complaint in said cause mentioned enacted March 14, 1899, entitled "An act to amend section three thousand six hundred and eight of the Political Code of the State of California relating to the general revenue of the State and to property liable to taxation for the purpose of revenue, and to add new sections to be known as sections three thousand six hundred and nine and three thousand six hundred and ten, also relating to the general revenue of the State and to property liable to taxation for the purpose of revenue," was and is constitutional and valid.

Third.—The Court erred in adjudging and decreeing that said last-mentioned act of the legislature is not contrary to the provisions of the fourteenth amendment of the Constitution of the United States, and not contrary to the provisions of section one of article XIII of the Constitution of the State of California.

Fourth.—The Court erred in adjudging and decreeing that said act of the legislature is not in violation of and repugnant to the provisions of section five thousand two hundred and nineteen of the Revised Statutes of the United States, in that the assessment and tax therein and thereby authorized and provided for, is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens in the State of California.

Fifth.—The Court erred in adjudging and decreeing that said act of the legislature did not, and does not, deprive complainant and the shareholders of complainant of their property without due process of law.

Sixth.—The Court erred in adjudging and declaring that said act of the legislature of the State of California was not, and is not, upon its face, void for contradiction and inconsistency:

Seventh.—The Court erred in adjudging and decreeing that said act of the legislature of the State of California was not void as providing for and authorizing a mode of the assessment and taxation of shares of the capital stock of national banking associations different from that authorized and provided for the assessment and taxation of the shares of stock in corporations organized and acting under the laws of the State of California, and in adjudging and declaring that under the provisions of said act, the shares of the shareholders of complainant were not assessed at a greater rate than that authorized and provided for the assessment and taxation of shares of stock in corporations organized and acting under the laws of the State of California.

Eighth.—The Court erred in adjudging and decreeing that under the laws of the State of California and the fourteenth amendment to the Constitution of the United States, as well as the provisions of the Constitution of the State of California, the legislature of said State, in and by the provisions of said act, could lawfully authorize a mode of taxation of the shares of the capital stock of complainant other and different from and more bur-

densome than that authorized and provided for the assessment and taxation of other shares of capital stock in corporations organized and acting under the laws of the State of California.

Ninth.—The Court erred in adjudging and decreeing that in making the assessment in the pleadings herein complained of, the Assessor of said City and County of San Francisco did comply with the requirements of the provisions of section three thousand six hundred and nine of said act of the legislature.

Tenth.—The Court erred in adjudging and decreeing that said Assessor did not violate the provisions of said section three thousand six hundred and nine of said act of the legislature.

Eleventh.—The Court erred in adjudging and decreeing that said Assessor in making said assessment in the pleadings herein complained of, did deduct from the value of the shares of the shareholders of complainant such sum as was or is in the same proportion to such value as the total value of, the real estate and property exempt by law from taxation bears to the whole value of all the shares of the capital stock of complainant.

Twelfth.—The Court erred in adjudging and declaring that said Assessor, in making said assessment, was legally entitled to assess the corporate property of complainant other than real estate; and that although such property and all thereof has been adjudged and declared not subject to State taxation and should be deducted from any assessment made under the Constitution and laws of the State of California, that said assessment so made

by said Assessor was not illegal and invalid, although it did include the same.

Thirteenth.--The Court erred in adjudging and declaring that in assessing the shares of the shareholders of complainant, said Assessor was legally entitled, in making such assessment, to apply a rule of valuation different from that applied in the assessment of all other property in the State of California, and particularly in the assessment of the property of corporations organized and acting under the laws of the State of California, and more onerous and burdensome than that applied in assessing other moneyed capital in the hands of individual citizens of said State.

Fourteenth.—The Court erred in adjudging and declaring the assessment made by said Assessor as in the pleadings herein stated was not invalid, illegal and void; although in making the same the said Assessor, in assessing the shares of the shareholders of complainant, applied the rule not of the valuation of the property of such shareholders, but superadded thereto goodwill of the business of complainant and including in estimating the value of such shares the property under the constitution and laws of the United States and of the State of California exempt from taxation, and in respect to which said shareholders were not and are not liable to assessment and taxation.

Fifteenth.—The Court erred in adjudging and declaring that in making said assessment as in the pleadings alleged and admitted, said assessor did not act in contravention of the provisions of the fourteenth amendment of the Constitution of the United States and of the

provisions of section five thousand two hundred and nineteen of the Revised Statutes of the United States; although in making said assessment, in allowing deductions, said Assessor only allowed the par value of the United States bonds held and owned by complainant and not the premium added thereto, while in ascertaining the value of the shares of the capital stock of complainant, said Assessor did include the amount of the premium upon said United States bonds and securities.

Sixteenth.—The Court erred in not granting the relief prayed by complainant in its original and several supplemental bills in the above-entitled cause.

Dated San Francisco, November 25th, A. D. 1902.

W. S. WOOD,
E. S. PILLSBURY,
ALFRED SUTRO,
Solicitors for Complainant.

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Of Counsel.

[Endorsed]: Service of the within Assignment of Errors, by copy, admitted this 25th day of November, A. D. 1902.

FRANKLIN K. LANE,
Per ASHER,
Attorney for Respondent.

Filed November 25, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, November term A. D. 1902, of the Circuit Court of the United States of America, Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Tuesday, the 25th day of November, in the year of our Lord one thousand nine hundred and two, the Honorable J. J. DE HAVEN, District Judge.

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco,
Respondent.
No. 12,928.

## Order Allowing Appeal.

Upon motion of W. S. Wood, Esq., one of the solicitors for complainant, and upon filing of a petition for an order allowing an appeal, an assignment of errors and an undertaking on appeal, approved in the sum of $500--

It is ordered that complainant be, and it is hereby, allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree filed and entered in the above-entitled cause on May 26th, A. D. 1902, and that a certified transcript of the record

and proceedings herein be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Service of the within Order Allowing Appeal, by copy, admitted this 25th day of November, A. D. 1902.

FRANKLIN K. LANE,
Per ASHER,
Attorney for Respondent.

Filed November 25, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

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*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco,
Respondent.
No. 12,928.

## Undertaking on Appeal.

Whereas, the San Francisco National Bank, complainant in the above-entitled cause, is about to appeal to the United States Circuit Court of Appeals for the Ninth

Circuit from the decree of the Circuit Court of the United States in and for the Northern District of California entered in said suit on May 26th, 1902, in favor of the respondent therein, and against The San Francisco National Bank aforesaid, denying to said complainant the relief prayed in and by its original bill of complaint and its several supplemental bills of complaint in said suit filed—

Now, therefore, in consideration of the premises and of such appeal, the undersigned do hereby undertake and promise, on the part of The San Francisco National Bank aforesaid, appellant, that the said appellant shall prosecute its said appeal to effect, and if it fail to make its plea good, shall answer and pay to said Washington Dodge all costs that may be awarded against it on the appeal or on a dismissal thereof, not exceeding the sum of five hundred dollars ($500), to which amount they acknowledge themselves bound.

S. G. MURPHY.
J. K. MOFFITT.

State of California,
City and County of San Francisco. } ss.

S. G. Murphy and J. K. Moffitt, being sworn, each for himself, says: That he is a freeholder in the Northern District of California, and is worth the sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

S. G. MURPHY.
J. K. MOFFITT.

Subscribed and sworn to before me this 25th day of November, 1902.

[Seal] PERCY E. TOWNE,

Notary Public in and for the City and County of San Francisco, State of California.

The foregoing undertaking is approved this 25th day of November, A. D. 1902.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed November 25th, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

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*In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco,
Respondent.
No. 12,928.

## Clerk's Certificate to Record on Appeal.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit,

in and for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 88, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original citation issued in said cause is annexed hereto, and that the cost of the foregoing transcript of record is $58.40, which said sum was paid by The San Francisco National Bank, complainant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 18th day of December, A. D. 1902.

[Seal] SOUTHARD HOFFMAN,

Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

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## Citation.

The President of the United States to Washington Dodge, as Assessor of the City and County of San Francisco, State of California, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for

the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on Monday, December 22d, A. D. 1902, pursuant to an order allowing appeal made and entered in the clerk's office of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, in a certain action numbered upon the register of actions of said Circuit Court No. 12,928, wherein The San Francisco National Bank, a national banking association, is appellant, and Washington Dodge, as Assessor of the City and County of San Francisco, State of California, is appellee, to show cause, if any there be, why the decree rendered against said appellant as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. J. DE HAVEN, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, ths 25th day of November, A. D. 1902.

JOHN J. DE HAVEN,
Judge.

Service of the within citation by copy, admitted this 25th day of November, A. D. 1902.

FRANKLIN K. LANE,
Per ASHER,
Attorney for Respondent.

[Endorsed]: No 12,928. United States Circuit Court, Ninth Circuit, Northern District of California. The San Francisco National Bank vs. Washington Dodge, as Assessor, etc. Citation. Filed November 25, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

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[Endorsed]: No. 926. In the United States Circuit Court of Appeals for the Ninth Circuit. The San Francisco National Bank, a National Banking Association, Appellant, vs. Washington Dodge, as Assessor of the City and County of San Francisco, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the Northern District of California.

Filed December 18, 1902.

F. D. MONCKTON,
Clerk.

# PROCEEDINGS

HAD IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term, A. D. 1902, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Monday, the fifth day of January in the year of our Lord one thousand nine hundred and three. Present: The Honorable WILLIAM W. MORROW, Circuit Judge; The Honorable CHARLES B. BELLINGER, District Judge; The Honorable JOHN J. DE HAVEN, District Judge.

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Appellant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco,
Appellees.
} No. 926.

## Order of Submission, Etc.

Upon motion of W. S. Wood, Esquire, counsel for the appellant, and upon the filing of a stipulation of counsel for the respective parties therefor, ordered appeal sub-

mitted to Bellinger and De Haven, District Judges, for consideration and decision upon the briefs heretofore filed in the case of The Nevada National Bank of San Francisco, etc., Appellant, vs. Washington Dodge, as Assessor, etc., et al., No. 794.

Thereupon, upon due consideration thereof, and it appearing to the Court that the case at bar involves the same questions that were determined by this Court in the case of The Nevada National Bank of San Francisco, etc., Appellant, v. Washington Dodge, etc., et al., Appellees, No. 794, it is ordered that a decree be entered herein affirming the decree of the Circuit Court of the United States for the Northern District of California, with costs.

It is further ordered that, in the event of the prosecution of an appeal of this case to the Supreme Court of the United States, a copy of the opinion of this Court in the case of The Nevada National Bank of San Francisco, etc., Appellant, vs. Washington Dodge, etc., et al., Appellees, No. 794, be made a part of the transcript of record on appeal.

*United States Circuit Court of Appeals, for the Ninth Circuit.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Appellant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco,
Appellee.
No. 926.

**Decree.**

Appeal from the Circuit Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of California and was duly submitted to the Court for consideration and decision upon the briefs heretofore filed in the case of The Nevada National Bank of San Francisco, a National Banking Association, Appellant, vs. Washington Dodge, as Assessor of the City and County of San Francisco, State of California, and Joseph H. Scott, as Tax Collector of said City and County, Appellees, No. 794.

On consideration whereof, and it appearing to the Court that this case involves the same questions determined by this Court in the case of The Nevada National Bank of San Francisco, a National Banking Association, Appellant, vs. Washington Dodge, as Assessor of the

City and County of San Franciesco, State of California, and Joseph H. Scott, as Tax Collector of said City and County, Appellees, No. 794, it is ordered, adjudged, and decreed by this Court, upon the authority of the said case, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

[Endorsed]: Decree. Filed and entered January 5th, 1903. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for the Ninth Circuit.*

THE NEVADA NATIONAL BANK OF SAN FRANCISCO (a National Banking Association),
Appellant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector, of said City and County,
Appellees.
No. 794.

**Opinion.**

Appeal from the Circuit Court of the United States for the Northern District of California.

T. I. BERGIN, for Appellant.

FRANKLIN K. LANE, City Attorney, and W. I. BROBECK, Assistant City Attorney, for Appellees.

Before GILBERT, Circuit Judge, and HAWLEY and De HAVEN, District Judges.

DE HAVEN, District Judge.—The appellant is a national banking association with its principal place of business at San Francisco in the State of California, and the bill of complaint in this case was filed by it to enjoin the assessmentof its sharesof stock to the individual owners thereof; and the assessment having been made, supplemental bills were filed by it to restrain the collection of the taxes levied upon the assessed value of such shares. The case was submitted to the Circuit Court for decision upon the pleadings and upon an agreed statement of facts, and thereupon a decree was entered by that Court dismissing the bill and supplemental bills. The assessment in question was made under an act of the legislature of the State of California, approved March 14, 1899 (Statutes of 1899, page 96), amending sections 3608 and 3609 of the Political Code of the State of California, and adding thereto a new section, numbered 3610. The sections referred to are as follows:

"3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associations not assessable by federal statute, shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute."

"3609. The stockholders in every national banking association doing business in this State, and having its principal place of business located in this State, shall be assessed and taxed on the value of their shares therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town, or county, or not; but in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provision of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California. In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State."

"3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this act. And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank; which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid."

1. It is claimed by appellant that this statute is inoperative and void, because of the following direction contained in section 3609 of the Political Code above set out:

"In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of the real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank."

It is argued that this is a specific direction by which the assessor must be governed, and as all the property of a national bank, except the real estate owned by it, is exempt by law from State taxation, the deductions which are thus directed to be made will leave nothing

of value in the shares to assess, and, quoting the language of counsel for appellant: "Thus is presented the case of a legislative mandate to exempt from assessment the whole subject of assessment. This construction renders the statute inoperative and void." Unquestionably, if the sentence above set out is to be construed literally and without reference to the context, the proposition for which the appellant contends is not without support, but it is a general rule of construction that the intention of the legislature is to be collected from the whole and every part of the statute, and not from some particular clause or sentence therein, and if it is possible so to do, its language must be so interpreted that the statute will be operative, and absurd and mischievous results avoided; and, "it is one of the great maxims of interpretation to keep always in view the general scope, object, and purpose of the law rather than its mere letter." (Rutledge vs. Crawford, 91 Cal. 533.) "A rigid and literal meaning would, in many cases, defeat the very object of the statute, and would exemplify the maxim that 'The letter killeth, while the spirit keepeth alive.' Every statute ought to be expounded, not according to the letter, but according to the meaning. * * * And the intention is to govern, although such construction may not, in all respects, agree with the letter of the statute." (Tracy vs. Troy & Boston R. R. Co., 38 N. Y. 437.) The object of the statute under consideration, was to provide for the assessment and taxation of shares of stock in national banking associations; and it is expressly declared there-

in, that "the assessment and taxation of such shares of stock in said national banking association, shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state." Now, it is evident that the purpose of the legislature in further providing in the same section, that in the assessment of their shares certain deductions should be allowed stockholders in national banking associations, was to carry out this express declaration that the taxation of such shares should not be at a greater rate than that assessed upon other moneyed capital. This being so, the particular sentence relating to such deductions upon which appellant relies, should be construed as requiring the assessor to first deduct from the total value of all its shares of stock the value of the real estate and all other property owned by the national banking association which under the laws of the State would be exempt from taxation in the hands of owners of other moneyed or competing capital, and then to assess to each individual stockholder his proportionate part of the remainder. This construction brings the sentence under consideration in harmony with the other parts of the section in which it appears, and gives effect to the general object which the legislature had in view in the enactment of the statute.

2. Section 5219 of the Revised Statutes provides that "the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the taxation shall not

be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank is located and not elsewhere." It cannot be doubted that the State, in the taxation of shares of stock in national banking associations, must observe the restrictions contained in this section of the Revised Statutes. (People vs. Weaver, 100 U. S. 543; Owensboro National Bank vs. Owensboro, 173 U. S. 664.) In the case last cited, the Court referring to section 5219 of the Revised Statutes, said:

"This section, then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any State tax, therefore, which is in excess of and not in conformity to these requirements is void."

The appellant contends that the statute of California relating to the assessment of shares in national banking associations is in conflict with that provision of section 5219 of the Revised Statutes, which declares that the taxation of such shares, "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." The first ground urged in support of this proposition is that under the law of the State of California, the shares of local banking corporations are not subject to taxation but only the

property of such corporations, and it is argued that this difference in the mode of assessment imposes upon the owners of shares in national banking associations a greater burden of taxation than is imposed upon stockholders in local banking corporations. It is true that under the system of taxation in force in the State of California, when all of the property belonging to a corporation is assessed to the corporation itself the shares of such corporation are not assessable in the hands of individual shareholders. (Political Code of California, section 6308; Burke vs. Badlam, 57 Cal. 601.) In the case just cited, Mr. Justice Ross, in delivering the opinion of the Court, observed:

"Now, what is the stock of a corporation but its property consisting of its franchise and such other property as the corporation may own? Of what else does it consist? If all this is taken way, what remains? Obviously nothing. When, therefore, all of the property of the corporation is assessed—its franchise and all of its other property of every character—then all of the stock of the corporation is assessed, and the mandate of the constitution is complied with."

And it was further said in the same opinion:

"To assess all the corporate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each."

We are unable to see that under the system of assessment provided for in the California statute, shares in national banking associations are valued higher in proportion to their real value than moneyed or competing capital of local banking corporations. The mode of assessing such shares directly to the owners thereof is certainly different from the indirect method of assessing the interest of stockholders of local banking corporations in the property of such corporations, but under the statute as we interpret it, all property which if owned by a local banking corporation or citizen of the State would be exempt from taxation under the State law, is when owned by a national banking association to be deducted from the total value of its shares in ascertaining the value of such shares for the purpose of assessment. Under this mode of proceeding no greater burden of taxation is imposed upon capital invested in national banking associations than is placed upon competing moneyed capital in the hands of individual citizens or local banking corporations, and this being so, there is no conflict between the statute of the State and section 5219 of the Revised Statutes. In exercising the power conferred by this section of the Revised Statutes, the State is not required to change its system of taxation and assess the shares of stock of its own local bank corporations directly to the holders thereof so as to conform to the precise method which it follows in the assessment of shares of national banking associations. All that is required is, that shares in national banking associations shall not be taxed by the State at a higher

rate than other moneyed capital in the hands of individual citizens of the State. This was so expressly ruled in Davenport Bank vs. Davenport, 123 U. S. 85, in which case the Supreme Court, speaking through Mr. Justice Miller, said:

"It has never been held by the Court that the State should abandon systems of taxation of their own banks, or of the money in the hands of other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is, that the system of State taxation of its own citizens, of its own banks, and of its own corporations, shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits, the manner of assessing and collecting all taxes by the States is uncontrolled by act of Congress."

It is further urged by appellant that shareholders in national banking associations are not allowed by the statute under consideration to deduct from the value of the shares owned by them the amount of unsecured debts which they owe to bona fide residents of the State, while local banks and individuals are permitted under the system of taxation in force in California to make such deductions from the amount of unsecured solvent

credits owned by them, and that in this respect the statute is in conflict with section 5219 of the Revised Statutes. We think, however, that under section 3609 of the Political Code, such deductions are allowed to the stockholders of national banking associations. It is therein provided that, "in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provisions of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California." If it should be conceded, as is claimed by appellant, that this language is not sufficient to authorize the assessor to make such deductions from the value of shares in national banking associations as are permitted by law to the holders of moneyed capital in the form of solvent credits, and this because such shares are not solvent credits, still authority for making such deductions is found in the further provision that, "the assessment and taxation of such shares of stock in said national banking association shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State." In order to effect this object, the assessor not only may, but, in our opinion, he is required in assessing shares of national banking associations, to make all deductions from the value of such shares which are permitted in the assessment of moneyed or competing capital of local banks and individual citizens of the State. But even if the statute

made no provision for such deductions, it would not follow that the assessment of which appellant complains is void, for it does not appear that any of its stockholders were indebted to bona fide residents of the State. (Supervisors vs. Stanley, 105 U. S. 305.)

3. The appellant also contends that the statute under which its shares were assessed is void, in that it does not provide for notice to the stockholders of the proceeding by which the assessment of their shares is to be made, and does not give to them an opportunity to be heard in relation thereto. Section 3610 of the Political Code provides that, "The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this act." We are unable to assent to the proposition that the notice thus provided for is insufficient when considered in connection with other sections of the Political Code of the State (sections 3672-3682), which provide for a board of equalization, with power to hear complaints respecting the justice of any assessment, and prescribe the time and place when and where such complaints may be heard. The shares of national banking associations are assessed under a general law of which the stockholder must take notice, and the time and place when and where he may appear for the purpose of applying for a reduction of the valuation placed upon his property is

fixed by a general law of which he must also take notice. This is, we think, under all of the authorities sufficient notice of proceedings for the assessment and taxation of property. In the language of the Supreme Court in Palmer vs. McMahon, 133 U. S. 669:

"The power to tax belongs exclusively to the legislative branch of the Government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law."

And in Kentucky Railroad Tax Cases, 115 U. S. 321, it was said:

"It has, however, been repeatedly decided by this Court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial and that 'due process of law,' as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient."

See, also, State vs. Runyon, 41 N. J. L. p. 98; Cooley on Taxation, pp. 265, 266.

It follows from what has been said that, in our opinion, the statute under which the assessment referred to in the bill of complaint was made, is valid, and the decree of the Circuit Court should be, and accordingly is, affirmed.

[Endorsed]: Opinion. Filed Oct. 6th, 1902. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals, for the Ninth Circuit.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Complainant and Appellant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco,
Respondent and Appellee.
} No. 926.

## Petition for Appeal.

To the Honorable, The Circuit Court of Appeals Above-named:

Your petitioner, the complainant and appellant in the above-entitled cause, represents that there is manifest error committed to the injury of petitioner in the decree of date January 5th, 1903, affirming the final decree pronounced in this case against it in favor of the respondent and appellee therein, filed and entered in the Circuit Court on the 26th day of May, 1902, and your petitioner is entitled to an appeal herein.

Wherefore, your petitioner, considering itself aggrieved by the decision of the Circuit Court, prays for an appeal from the decree affirming said final decree to the Supreme Court of the United States.

Your petitioner herewith files its bond in the penal sum of five hundred dollars, which bond is approved by the Honorable William B. Gilbert, one of the Judges of this Court, and appellant also files its assignment of errors with its petition.

LLOYD & WOOD,
E. S. PILLSBURY,
ALFRED SUTRO,
Solicitors for Complainant and Appellant.

[Endorsed]: Petition for Appeal. Filed Apr. 22, 1903. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals, for the Ninth Circuit.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Complainant and Appellant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco,
Respondent and Appellee.
No. 926.

## Assignment of Errors.

Now comes the San Francisco National Bank, the complainant and appellant in the above-entitled cause, and makes the following assignment of errors in the decree affirming the decree of the Circuit Court herein, namely:

First.—The Court erred in affirming the decree entered by the Circuit Court in the above-entitled cause on the 26th day of May, 1902.

Second.—The Court erred in affirming the decree entered by the Circuit Court adjudging and decreeing that that certain act of the legislature of the State of California in the bill of complaint in said cause mentioned enacted March 14, 1899, entitled "An act to amend section three thousand six hundred and eight of the Political Code of the State of California, relating to the general revenue of the State and to property liable to taxation for the purpose of revenue, and to add new sections to be known as sections three thousand six hundred and nine and three thousand six hundred and ten, also relating to the general revenue of the State and to property liable to taxation for the purpose of revenue," was and is constitutional and valid.

Third.—The Court erred in affirming the decree entered by the Circuit Court adjudging and decreeing that said last-mentioned act of the legislature is not contrary to the provisions of the fourteenth amendment of the Constitution of the United States, and not contrary to the provisions of section one of article XIII of the Constitution of the State of California.

Fourth.—The Court erred in affirming the decree entered by the Circuit Court adjudging and decreeing that said act of the legislature is not in violation of and repugnant to the provisions of section five thousand two hundred and nineteen of the Revised Statutes of the United States, in that the assessment and tax therein

and thereby authorized and provided for, is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens in the State of California.

Fifth.—The Court erred in affirming the decree entered by the Circuit Court adjudging and decreeing that said act of the legislature did not, and does not, deprive complainant and appellant and the shareholders of complainant and appellant of their property without due process of law.

Sixth.—The Court erred in affirming the decree entered by the Circuit Court adjudging and declaring that said act of the legislature of the State of California was not, and is not, upon its face, void for contradiction and inconsistency.

Seventh.—The Court erred in affirming the decree entered by the Circuit Court adjudging and declaring that said act of the legislature of the State of California was not void as providing for and authorizing a mode of the assessment and taxation of shares of the capital stock of national banking associations different from that authorized and provided for the assessment and taxation of the shares of stock in corporations organized and acting under the laws of the State of California, and in adjudging and declaring that under the provisions of said act, the shares of the shareholders of complainant and appellant were not assessed at a greater rate than that authorized and provided for the assessment and taxation of shares of stock in corporations organized and acting under the laws of the State of California.

Eighth.—The Court erred in affirming the decree en-

tered by the Circuit Court adjudging and decreeing that under the laws of the State of California and the fourteenth amendment to the Constitution of the United States, as well as the provisions of the Constitution of the State of California, the legislature of said State, in and by the provisions of said act, could lawfully authorize a mode of taxation of the shares of the capital stock of complainant and appellant other and different from and more burdensome than that authorized and provided for the assessment and taxation of other shares of capital stock in corporations organized and acting under the laws of the State of California.

Ninth.—The Court erred in affirming the decree entered by the Circuit Court adjudging and decreeing that in making the assessment in the pleadings herein complained of, the Assessor of said City and County of San Francisco did comply with the requirements of the provisions of section three thousand six hundred and nine of said act of the legislature.

Tenth.—The Court erred in affirming the decree entered by the Circuit Court adjudging and decreeing that said Assessor did not violate the provisions of said section three thousand six hundred and nine of said act of the legislature.

Eleventh.—The Court erred in affirming the decree entered by the Circuit Court adjudging and decreeing that said Assessor in making said assessment in the pleadings herein complained of did deduct from the value of the shares of the shareholders of complainant and appellant such sum as was or is in the same proportion to

such value as the total value of the real estate and property exempt by law from taxation bears to the whole value of all the shares of the capital stock of complainant and appellant.

Twelfth.—The Court erred in affirming the decree entered by the Circuit Court adjudging and declaring that said Assessor, in making said assessment, was legally entitled to assess the corporate property of complainant and appellant other than real estate; and that although such property and all thereof has been adjudged and declared not subject to State taxation and should be deducted from any assessment made under the Constitution and laws of the State of California, that said assessment so made by said Assessor was not illegal and invalid, although it did include the same.

Thirteenth.—The Court erred in affirming the decree entered by the Circuit Court adjudging and declaring that in assessing the shares of the shareholders of complainant and appellant, said Assessor was legally entitled, in making such assessment, to apply a rule of valuation different from that applied in the assessment of all other property in the State of California, and particularly in the assessment of the property of corporations organized and acting under the laws of the State of California, and more onerous and burdensome than that applied in assessing other moneyed capital in the hands of individual citizens of said State.

Fourteenth.—The Court erred in affirming the decree entered by the Circuit Court adjudging and declaring the assessment made by said Assessor, as in the pleadings

herein stated, was not invalid, illegal, and void; although in making the same the said Assessor, in assessing the shares of the shareholders of complainant and appellant, applied the rule not of the valuation of the property of such shareholders, but superadded thereto goodwill of the business of complainant and appellant, and included, in estimating the value of such shares, the property under the constitution and laws of the United States and of the State of California exempt from taxation, and in respect to which said shareholders were not and are not liable to assessment and taxation.

Fifteenth.—The Court erred in affirming the decree entered by the Circuit Court adjudging and declaring that in making said assessment, as in the pleadings alleged and admitted, said assessor did not act in contravention of the provisions of the fourteenth amendment of the constitution of the United States and of the provisions of section five thousand two hundred and nineteen of the Revised Statutes of the United States; although in making said assessment, in allowing deductions, said Assessor only allowed the par value of the United States bonds held and owned by complainant and appellant and not the premium added thereto, while in ascertaining the value of the shares of the capital stock of complainant and appellant, said Assessor did include the amount of the premium upon said United States bonds and securities.

Sixteenth.—The Court erred in affirming the decree entered by the Circuit Court refusing to grant the relief

prayed by complainant and appellant in its original and several supplemental bills in the above-entitled cause.

Dated San Francisco, March 31st, 1903.

LLOYD & WOOD,
E. S. PILLSBURY,
ALFRED SUTRO,
Solicitors for Complainant and Appellant.

[Endorsed]: Assignment of Errors. Filed Apr. 22, 1903. F. D. Monckton, Clerk.

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## Bond on Appeal.

Know all men by these presents, that we, The San Francisco National Bank, a national banking association, as principal, and James K. Lynch and James K. Moffitt, as sureties, are held and firmly bound unto Washington Dodge, as Assessor of the City and County of San Francisco, in the full and just sum of five hundred dollars, to be paid to said Washington Dodge as such Assessor, or to his successors in interest and legal representatives; to which payment, well and truly to be made, we bind ourselves, our successors in interest and legal representatives, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this sixth day of April, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at the United States Circuit Court of Appeals for the Ninth Circuit, in an appeal depending

in said Court between The San Francisco National Bank (a national banking association), and Washington Dodge, as Assessor of the City and County of San Francisco, a decree was duly given and made affirming the decree rendered against said The San Francisco National Bank by the United States Circuit Court in and for the Northern District of California, and the said The San Francisco National Bank having obtained from said Court of Appeals an order allowing an appeal to reverse the said decree on the aforesaid appeal, and a citation directed to the said Washington Dodge as Assessor of the City and County of San Francisco, citing and admonishing him as such Assessor, to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within sixty days from the date thereof:

Now, the condition of the above obligation is such, that if the said The San Francisco National Bank, complainant and appellant as aforesaid, shall prosecute said appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SAN FRANCISCO NATIONAL BANK. [Seal]
By JAMES K. WILSON, [Seal]
President.

[Seal of San Francisco National Bank]

JAMES K. LYNCH. [Seal]
J. K. MOFFITT. [Seal]

Acknowledged before me the day and year first above written.

[Seal] PERCY E. TOWNE,

Notary Public in and for the City and County of San Francisco, State of California.

United States of America,
Northern District of California } ss.

James K. Lynch and James K. Moffitt, being duly sworn, each for himself, deposes and says that he is a householder in said District, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

JAMES K. LYNCH.
J. K. MOFFITT.

Subscribed and sworn to before me this 6th day of April, 1903.

[Seal] PERCY E. TOWNE,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Bond. Form of bond and sufficiency of securities approved.

WM. B. GILBERT,
Judge.

Filed Apr. 22, 1903. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, for the Ninth Circuit.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Complainant and Appellant,
vs.
WASHINGTON DODGE, as Assessor, etc.,
Respondent and Appellee.
} No. 926.

**Order Allowing Appeal.**

Upon motion of W. S. Wood, Esq., one of the solicitors for complainant and appellant, and upon filing of a petition for an order allowing an appeal, an assignment of errors, and a bond on appeal approved in the sum of $500—

It is ordered that complainant and appellant be, and it is hereby, allowed an appeal to the Supreme Court of the United States from the decree of this Court affirming the final decree filed and entered in the above-entitled cause by the Circuit Court on the 26th day of May, A. D. 1902, and that a certified transcript of the record and proceedings herein be transmitted to said Supreme Court of the United States.

WM. B. GILBERT,
Judge.

[Endorsed]: Order Allowing Appeal. Filed Apr. 22, 1903. F. D. Monckton, Clerk.

*United States Circuit Court of Appeals, for the Ninth Circuit.*

THE SAN FRANCISCO NATIONAL BANK (a National Banking Association),
Appellant,
vs.
WASHINGTON DODGE, as Assessor of The City and County of San Francisco,
Appellee.
No. 926.

**Certificate of Clerk C. C. A. to Transcript of Record.**

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and twenty-nine (129) pages, numbered from one (1) to one hundred and twenty-nine (129), inclusive, to be a true copy of the record, assignment of errors, and of all proceedings in the above-entitled case, including a copy of the opinion in the case of The Nevada National Bank of San Francisco, a National Banking Association, Appellant, vs. Washington Dodge, as Assessor of the City and County of San Francisco, State of California, and Joseph H. Scott, as Tax Collector of said City and County, Appellees, No. 794, as the same appear of record in my office, and that the same, together, constitute the transcript of record herein on appeal to the Supreme Court of the United States.

Attest my hand and the seal of said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, this 29th day of April, A. D. 1903.

[Seal] F. D. MONCKTON,
Clerk.

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## Citation on Appeal.

UNITED STATES OF AMERICA—ss.

The President of the United States to Washington Dodge, as Assessor of the City and County of San Francisco. Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, District of Columbia, within sixty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Circuit Court of Appeals, for the Ninth Circuit, wherein the San Francisco National Bank, a national banking association, is appellant, and you are appellee, to show cause, if any there be, why the decree of said Circuit Court of Appeals affirming the decree rendered against said appellant and by the Circuit Court of the United States in the Ninth Judicial Circuit in and for the Northern District of California, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM B. GILBERT, United States Circuit Judge for the Ninth Judicial Circuit, this 20th day of April, A. D. 1903.

WM. B. GILBERT,
United States Circuit Judge.

Service and receipt of a copy this 22d day of April, 1903, is hereby admitted of the within citation, and petition for appeal, assignment of errors and order allowing appeal, all in the matter of the San Francisco National Bank vs. Washington Dodge, as Assessor, etc.

FRANKLIN K. LANE,
City Attorney,
Attorney for Respondent.

[Endorsed]: Citation. Filed Apr. 23, 1903. F. D. Monckton, Clerk.

SUPREME COURT

OCTOBER TERM,

No. [redacted]

THE SAN FRANCISCO [redacted]

vs.

WASHINGTON DODGE, [redacted]
CITY AND COUNTY OF SAN FRANCISCO,

# Brief for Appellant.

Filed [redacted]

IN THE

# Supreme Court of the United States.

October Term 1904.

No. 44.

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THE SAN FRANCISCO NATIONAL BANK,
*Appellant,*

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO,
*Appellee.*

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## Brief for Appellant.

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This is an appeal from a judgment of the Circuit Court of Appeals of the Ninth Circuit.

The case was originally brought in the Circuit Court for the Northern District of California, and was taken therefrom by appeal to the Court from which the present appeal is prosecuted.

The question involved concerns the validity of an assessment and tax made and levied upon the shares of the capital stock of appellant.

The appellant is a national bank having a capital stock of $500,000, divided in 5,000 shares, of the par value of

$100 each, all of which are outstanding and owned by a large number of persons.

In the year 1881, the Legislature of the State of California adopted a new section to the Political Code reading:

> "Sec. 3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor."

In the year 1899, the Legislature passed an act amending Section 3608 of the Political Code and adding new sections to be known as Sections 3609 and 3610.

Sections 3608, as amended, and the added sections read:

> "3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations (save and except the property of national banking associations not assessable by federal statute), shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation (save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute)."
>
> "3609. The stockholders in every national banking association doing business in this State, and having its principal place of business located in this State, shall be assessed and taxed on the value of

their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town or county, or not; but in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits in the same manner as such deductions are allowed by the provisions of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California. In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State."

"3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholder of such assessment shall be necessary for the purpose of this act. And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the

stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid."

Statutes 1899, page 96.

Under the authority claimed to have been given by the foregoing enactments, the appellee, as Assessor of the City and County of San Francisco, on or about March 12, 1900, upon being furnished with a list of stockholders, proceeded to assess the shares of appellant for State and City and County purposes. The appellant did not own any real estate, but was possessed of certain personal property as follows:

| | |
|---|---|
| Bonds of the United States of the face value of $50,000, with premium added of the actual value of | $ 54,800.00 |
| Cash | 175,748.00 |
| Furniture of the value of | 5,450.00 |
| Solvent credits over and above debts due and owing, amounting to | 343,663.32 |
| and Redemption fund | 2,250.00 |
| making the aggregate the sum of | $581,911.32 |

as the total value of its personal property.

The appellee fixed the value of the shares for taxation purposes at $104.356 each and arrived thereat in the following manner: He added to the capital stock of appellant, amounting to the sum of $500,000 its undivided profits amounting to the sum of $77,260, making in the aggregate the sum of $577,260, and then deducted therefrom the face value of the United States bonds, namely,

$50,000, and the value of the furniture of appellant, namely, $5,500, or in the aggregate $55,500, leaving $521,760 as the total assessable value of the property of appellant; and upon dividing the sum by the number of shares of the capital stock of appellant, made the assessable value of each share the sum before stated.

The tax levy for the year 1900 for State and City and County purposes was by the proper authorities fixed at $1.63 on each one hundred dollars of value, and finding that 1,217 shares of the capital stock of appellant stood upon its books in the names of persons not owning real estate, the appellee demanded of appellant the payment of the taxes thereon, amounting to the sum of $2,071.58, and in default of such payment threatened to seize the property of appellant. Thereupon and in order to prevent such seizure, the action was begun and a preliminary injunction secured.

The cause was submitted upon an agreed statement of facts, in which, after the admission of matters alleged in various paragraphs of the Bill of Complaint, the following facts are agreed:

1. That the financial standing of the one hundred and seventy-eight commercial banks of California is shown in a tabulated statement annexed to the stipulation and copied in the record.

From the statement it appears that the State Banks had credits amounting to more than eighty-four millions of dollars which, under the constitution and laws, they were entitled to deduct from debts, among which are debts to depositors $84,197,990 and to other banks $8,421,544.

That the Commercial Banks are assessed and pay taxes in the manner and form prescribed by the State of California, and that solvent credits owned and held by said banks were moneyed capital in the hands of individual citizens, to wit, the Commercial Banks which enter into competition with appellant; that the franchises of commercial banks and trust companies were also assessed to such companies.

That the manner in which the franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30th, 1901, by the Assessor of the city and county of San Francisco, is illustrated by the case of The Bank of California, a banking corporation organized under the laws of the State of California, and which on said 5th day of March, 1900, had and now has its principal place of business in the said city and county of San Francisco. On the 5th day of March, 1900, the resources of The Bank of California were as follows:

| | |
|---|---|
| Bank premises | $ 250,000.00 |
| Real estate taken for debt | 293,629.27 |
| U. S. Bonds | 1,203,380.95 |
| Stocks and bonds of California corporations | 1,273,118.86 |
| Furniture | 1,000.00 |
| Library | 500.00 |
| Typewriter | 50.00 |
| Money on hand | 2,135,224.00 |
| Total | $5,906,403.08 |

That the market value of the stock of The Bank of California on said 5th day of March, 1900, was $405 per share, and that on said day there were issued and outstanding twenty thousand shares of the capital stock of

said bank. That the Assessor of said city and county assessed to The Bank of California for the fiscal year ending June 30th, 1901, the following property as held and owned by The Bank of California at 12 o'clock M. on March 5th, 1900.

| | |
|---|---|
| Real estate | $ 105,000.00 |
| Improvements thereon | 70,000.00 |
| Furniture | 1,000.00 |
| Library | 500.00 |
| Money | 2,135,224.00 |
| Typewriter | 50.00 |
| Franchise | 750,000.00 |
| Total | $3,061,774.00 |

That there were shares of stock in commercial banking corporations amounting to the sum of thirty million dollars in said State.

That demand was made on appellant for payment of total amount of tax on shares where same was not secured by real estate.

That before making the assessment, appellee caused to be addressed to each stockholder a notice to the effect that such stockholder would be assessed at a named sum upon his shares; that the assessment would be attached to any real estate owned by the stockholder in the City and County, and in case of stockholders not owning real estate, such steps would be taken for the immediate collection of the tax as are authorized by law, and that in case the stockholder had any exemptions or reductions allowed by law, he was asked to call at the Assessor's offce in ten days; that none of the stockholders accepted the invitation, or made any return, and

finally that appellant made no return or statement of any debts due or owing by it unsecured by deed, mortgage or other lien on real or personal property, nor did appellant, or any one for it, ask or request such reduction or deduction.

The foregoing is a synopsis of the agreed statement of facts.

The Constitution of the State of California provides:

> "All property in this State not exempt under the laws of the United States shall be taxed in proportion to its value to be ascertained as provided by law.
> "The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed. * * *
> "The Legislature may provide, except in case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of the State."
> Section 1, Article XIII.

Section 3628, Political Code, provides that in assessing solvent credits not secured by mortgage or trust deed, a reduction therefrom shall be made of debts due to bona fide residents of the State.

The questions involved in the appeal are:

(1) That the Act of 1899, providing for the assessment and taxation of shares of the capital stock of National Banks is repugnant to the provisions of Section 5219 of the Revised Statutes of the United States:

(a) Because shares of stock in the Commercial Banks of the State are not taxed and are exempt;

(b) Because by reason of the failure to tax shares in the Commercial Banks of the State, the shares of

national banks are subjected to an adverse discrimination and taxed at a higher rate than such Commercial Bank shares;

(c) Because the provisions, Section 3609, are wholly void, in that it is thereby undertaken to provide that a stockholder may deduct from the value of his shares the amount of his debts due to bona fide residents of the State.

(2) That under the express provision of the Political Code, Sections 3608 and Section 3609, the whole property of the appellant included in the assessment was exempt from taxation.

## CONSTITUTIONAL SCOPE OF TAXATION.

In *McCulloch* vs. *The State of Maryland*, 4 Wheaton, 316-429, Chief Justice Marshall observes that,

> "All subjects over which the sovereign power of a state extends are objects of state taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self evident. The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution the powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state can not confer a sovereignty which will extend over them. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed,

> and the question whether it has been surrendered can not arise."

The principle thus announced has ever since remained an axiom in constitutional law.

Section 3 of Article I of the Constitution of California declares that,

> "The Constitution of the United States is the supreme law of the land."

Section 1 of Article XIII of the Constitution of California declares that,

> "All property in this state, *not exempt under the laws of the United States*, shall be taxed in proportion to its value, *to be ascertained as provided by law.*"

This is the source and measure of the constitutional power of the legislature to enact revenue legislation. The declaration is not that all property in the state shall be taxed. Only certain property is to be taxed: all property in the State, not exempt under the laws of the United States. Upon the principle announced by Chief Justice Marshall rests this right of exemption from state taxation; and the exemption is co-extensive with the right itself. The property thus exempted is not subject to state taxation. Mere physical presence within the territorial limits of the sovereignty does not authorize the exercise of the power of taxation. It is a sovereign power. Its exercise is limited by and co-extensive with only the sovereignty of which it is an essential attribute. Property exempt under the laws of the United States independently of this constitutional declaration, would, under the Constitution of the United

States, be exempt from state taxation; but, in order to render this exemption unmistakable and indubitable, the declaration was made in the Constitution of the State that such property shall not be subject to taxation.

In respect to such property, neither the legislature nor the state taxing officers have any authority upon the subject of taxation. It is entirely withdrawn from their jurisdiction. Neither the legislature nor the state taxing officer is authorized to consider the same in dealing with the property that alone the constitution declares shall be taxed. The constitutional injunction is mandatory and prohibitory. Its purpose must not be evaded, directly or indirectly. It matters not how or by whom the exempt property may be held, the exemption is equally obligatory. The exemption must be allowed in its entirety.

*Pollock* vs. *Farmers' Loan and Trust Co.*, 157 U. S., 429, 581, 582, 583, 585, 586, 592, 646, 652.

When, therefore, the legislature undertakes to enact revenue legislation, its authority to act is circumscribed by this constitutional limitation. It has no constitutional power to enact revenue legislation in respect to such exempted property. The constitutional declaration proclaiming its exemption from State taxation, is under the terms of the Constitution itself, *mandatory* and *prohibitory;* and, therefore, State legislation, under the provisions of the Constitution of this State, is wholly incompetent to legislate upon or affect by its revenue legislation any property exempt under the laws of the United States. The property that alone is taxable

under the laws of the State of California is property not exempt under the laws of the United States; and only in respect to such property has the legislature constitutional power to enact revenue laws.

In respect to property subject to State legislation the Constitution of California is not self-executing. Under the Constitution of California there can be no taxation without legislation. The constitutional mandate is that the taxable property of the State shall be taxed in proportion to its value to be ascertained as provided by law. Proportion to *its value* is a constitutional condition of state taxation; but such value is to be ascertained as provided by law. Hence, there must be legislation before there can be constitutional taxation under the Constitution of California.

Under the constitutional principle thus announced by Chief Justice Marshall, national banks are not subject to state taxation. The franchise to be a national bank is not subject to state taxation.

*Owensboro National Bank* vs. *Owensboro,* 173 U. S., 671;

*National Bank of Louisville* vs. *Louisville,* 174 U. S., 438-439.

*First National Bank of Louisville* vs. *Stone,* 174 U. S., 438-439.

While national banks are not subject to state taxation, Congress has declared that

> "The legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions that the

taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere."

United States Revised Statutes, Sec. 5219, 173 U. S., 668, *Owensboro National Bank* vs. *Owensboro.*

This is the measure of the power of the state to tax national banks.

*First National Bank* vs. *San Francisco,* 129 Cal., 97.

The authority thus given is to tax, not the banks, but the shareholders; and the authority to tax shareholders is upon the express limitations thus declared by Congress.

Whenever, therefore, state legislation assumes to tax shareholders of national banks at a greater rate than other moneyed capital in the hands of individual citizens of such state, such legislation is unconstitutional and void.

*People* vs. *Weaver,* 100 U. S., 539;
*Pelton* vs. *National Bank,* 101 U. S., 146;
*Evansville Bank* vs. *Britton,* 105 U. S., 322;
*McHenry* vs. *Downer,* 116 Cal., 25;
*Miller* vs. *Heilbron,* 58 Cal., 133.

The question occurs, therefore: Is there in California any legislation authorizing taxation of shares in national banks? And, if there be such legislation, is it constitutional?

In *McHenry* vs. *Downer*, 116 Cal., 25, the Supreme Court decided that there was no constitutional legislation of the state authorizing the taxation of shares in national banks. Evidently with a view of supplying such omission, the legislature passed the act of March 14, 1899 (Statutes of 1899, p. 96).

**Constitutionality of the Act of the Legislature Undertaking to tax Shareholders in National Banks.**

To determine the constitutionality of this Act it becomes necessary to examine its provisions in order to ascertain whether or not it authorizes taxation of shareholders in national banks at a rate not greater than assessed upon other moneyed capital in the hands of individual citizens of the State.

Section 3608 declares that:

> "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associations not assessable by federal statute, shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute."

Under the provisions of this section the stockholder in a State corporation is not subject to taxation. The corporate property of the corporation is alone subject to taxation.

The constitutionality of this statute as to the exemption of shares in state corporations was affirmed in

*Burke* vs. *Badlam*, 57 Cal., 594;

*City and County of San Francisco* vs. *Mackay*, 10 Sawyer, 302;

*County Commissioners* vs. *Farmers & Mechanics' Bank*, 48 Md., 117;

*Germania Trust Co.* vs. *San Francisco*, 128 Cal., 594.

The rule is familiar, that the decisions of the Supreme Court of the State, construing its constitution and statutes, are binding upon the Federal courts.

Upon the provisions of this section we may remark:

First. Shares of stock in State corporations are declared the taxable equivalent of the corporate property of the corporation;

Second. That shares of stock in a corporation possess no intrinsic value over and above the actual value of the property of the corporation; thus making a legislative declaration and rule for assessment of corporate property binding upon assessors, and to the benefit of which the stockholder is entitled.

Third. Under the provisions of this statutory declaration the stockholders in the state corporation cannot be assessed for his stock at all. The corporation alone is assessed for the corporate property.

The rule thus provided in respect to state corporations is declared inapplicable to national banking associations. While the state corporation is alone assessable under its provisions, there is no authority for assessing national banking associations. Of course, had there been,

it would have been idle, as the State has no power to authorize assessment of the same.

It will be observed that the statutory declaration, and the decision of the Court in *Burke* vs. *Badlam,* 57 Cal., 594, that shares of stock possess no intrinsic value, is at variance with the well-settled decisions of the Federal Courts, the last of which is contained in the Owensboro case 173 U. S., 671; yet, it having been enacted by the legislature, and the constitutionality of that enactment having been affirmed by the Supreme Court of the State, it is binding upon all persons within the State of California subject to its jurisdiction; and all such persons are entitled to invoke the benefit of its provisions. The stockholder in a national bank association is no less entitled to its benefit than the stockholder in a state corporation.

In these particulars, therefore, this section of the Political Code discriminates between shareholders in national bank associations and stockholders in state corporations:

1. The stock of the one is subject to state taxation; the stock of the other is not.

2. The statutory rule as to the value of stock is made applicable to state corporations, and declared inapplicable to national banking associations.

3. The corporate property alone of state corporations is assessable, while, of course, there is neither provision nor authority for assessing the corporate property of national banking associations.

*First National Bank* vs. *San Francisco,* 129 Cal., 96.

Section thirty-six hundred and nine of this Statute of 1899 declares,

FIRST: Stockholders in national banking associations, doing business in this State, and having its principal place of business in this State, shall be assessed.

SECOND: Such stockholders shall be assessed and taxed on the value of their shares of stock therein.

To render this provision constitutional, the value thus declared taxable should be of no greater value than the actual taxable value of the property of the corporation. Such is the rule under the provisions of section thirty-six hundred and eight in respect to State corporations; and only by applying that rule to shareholders in national bank associations can they stand upon equality with stockholders in State corporations.

If such value be greater than the actual value of the corporate property of the corporation, as applied to shareholders in national banking associations, to the extent of such difference, over and above the actual value of the corporate property, there will be a discrimination against the shareholders in the national banking association, rendering the statute unconstitutional.

Instead of applying this rule, applied to State corporations, a different one is applied to shareholders in national bank associations. The rule declared in respect to shares in national banking associations under section thirty-six hundred and nine is,

> "Said shares shall be valued and assessed as is other property for taxation."

That shares of stock and corporate property essentially differ in value is the settled doctrine of the Federal

Courts in the various decisions already called to the attention of the Court. And that the difference in thus assessing the shareholders in national bank associations largely discriminates against them must be obvious.

*Supervisors* vs. *Stanley,* 105 U. S., 311;
*Evansville Bank* vs. *Britton,* 105 U. S., 324.

In regard to State corporations, nothing but property is assessed. The provision for its assessment is the same as that for the assessment of individual property. The only element entering into it that is properly permissible in its assessment is the value—its actual cash value according to the definition prescribed by the statute.

In addition to this, in assessing the corporate property of the corporation, the corporation is entitled to all the exemptions allowed by law. Federal bonds and Federal securities that it may hold must be deducted in assessing its corporate property. They are entitled to all the deductions authorized by the provisions of paragraph six of section thirty-six hundred and twenty-nine of the Political Code; that is to say, "all solvent credits, unsecured by deed of trust, mortgage or other lien on real or personal property, due or owing to such person, or any firm of which he is a member, or due or owing to any corporation of which he is president, secretary, cashier, or managing agent, *deducting from the sum total of such credits* such debts only, unsecured by trust deed, mortgage or other lien on real or personal property as may be owing by such person, firm or corporation, to bona fide residents of this State. No debt shall be so deducted unless the statement shows the amount of such debt as stated under oath in aggregate; provided,

in case of banks, the statement is not required to show the debt in detail, or to whom it is owing; but the assessor shall have the privilege of examining the books of such banks to verify said statement."

Under authority of this provision, State banks are entitled to, and do, deduct the amount they owe to their depositors from the amount due them. If a corporation owns property exempt from taxation, it is entitled to claim the exemption. In fact, the Constitution, declaring what property shall be taxed, excludes property exempt under the laws of the United States from the taxable property of the State.

The sum, therefore, of the assessable value of the corporate property of state corporations is the amount of the value of corporate property remaining after making these deductions therefrom.

Stock, however, is valued in an entirely different way. The value of the stock of a corporation not only depends upon the value of the corporate property, but also upon the skill and efficiency with which its business is conducted, the character of the business, its value, remunerative nature, and various other elements entering into the value of a successful business. The cash value of the plants of two corporations may be precisely the same intrinsically, yet the stock of the two corporations may differ greatly in market value: the one enterprise may not be a success, the other may be prosperous and profitable; the one may have to levy assessments while the other is declaring dividends to its stockholders.

Evidently, therefore, when the stock of the corporation is assessed, and not its corporate property, the assess-

ment of the stock will embrace and include elements not at all entering into the assessment of the property. The difference in amount between these respective elements is necessarily a discrimination against the stockholders in national banks and this discrimination necessarily results from really assessing the stock and not the corporate property of the corporation.

The rule, therefore, applicable to the property of the stockholder in a state corporation, or in a state bank, is not the equivalent of the rule made applicable to stockholders in national banking associations.

In the cases of *Miller* vs. *Heilbron,* 58 Cal., 133, and *McHenry* vs. *Downer,* 116 Cal., 20, the Court declared the rule sought to be applied to the assessment of shares in national bank associations invalid, because in making such assessments deductions were not authorized to be made as provided in paragraph six of Section thirty-six hundred and twenty-nine of the Political Code. Even allowing such deductions, the statute would still remain open to objection for the reason stated and for the further reason that essentially and necessarily included in the valuation of stock is the value of the franchise of the corporation. The franchise of national banking associations, being a federal one is exempt from state taxation, and cannot, therefore, legitimately be allowed to constitute an element of the assessable value of the stock of a shareholder in national banking associations.

Section thirty-six hundred and nine further declares that

"In the assessment of such shares, each stock-

holder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provisions of paragraph six of Section thirty-six hundred and twenty-nine of the Political Code of the State of California."

Does this provision obviate the objection held fatal in *Miller* vs. *Heilbron,* 58 Cal., 133, and *McHenry* vs. *Downer,* 116 Cal., 20?

Apart from the declaration contained in this amendment, the stockholder, under the law, would be entitled to the deductions allowed by paragraph six of section thirty-six hundred and twenty-nine of the Political Code. This declaration accords him no greater measure of right than he would be entitled to without it. The amendment fails to obviate the difficulty. The real difficulty was and is that the stockholder in a state corporation individually was entitled to the benefit of this exemption, and the corporation itself was equally entitled to the benefit of this exemption. Thus a stockholder in a State bank not only gets the benefit of the deduction of all that he may personally owe to bona fide residents, but also the benefit of the deduction of all that the corporation may owe to such bona fide residents. National bank associations, not being subject to State taxation, are not, as State banks are, in a position to claim the benefit of this right to deductions.

The amendment does not give the stockholder in national banking associations the benefit thus secured to the stockholder in the State bank, through the assessment being made against the corporate property of the corporation. It contains no declaration that in making

the assessment he shall be allowed, not only the benefit of the deductions provided for in paragraph six of section thirty-six hundred and twenty-nine of the Political Code to himself personally, but also his proportion of the deductions to which the banking association would have been entitled were it a State and not a national institution.

Paragraph six of section thirty-six hundred and twenty-nine stands now as it did before the Act of March 14, 1899. As under its terms he was not then entitled to the deductions neither is he now. The objection held good in *Miller* vs. *Heilbron* and *McHenry* vs. *Downer* still remains, and is equally fatal to the attempt to tax the shares of stock in national banks. Stock is not now any more than it was then a solvent credit.

> *Dutton* vs. *Bank*, 53 Kans., 440-463;
> *First National Bank* vs. *Ayres*, 160 U. S., 660-664;
> *McHenry* vs. *Downer*, 116 Cal., 20-27-29.

Its terms will no more authorize the shareholder of a national bank to now claim from the value of his stock deduction of his proportionate share of the debts of the bank to bona fide residents of this State than they did before the enactment of the Statute of March 14, 1899.

In various cases, of which *Aberdeen Bank* vs. *Chehalis County*, 166 U. S., 440, is an illustration this Court has been called upon to determine whether or not exemptions allowed by state laws could operate as a discrimination in the assessment and taxation of shares in national banks. In these decisions the Court established the position that where its constitution permits the state legislature may

make such exemptions from taxation as in its wisdom it may deem proper, and that such exemptions will not operate to create an injurious discrimination in the assessment and taxation of the shares in national banks, that the rule regarding such discrimination can only operate in respect to property *subject to taxation* under the laws of the state, and that it is only in respect to such property the rule against discrimination can have any application. This, of course, is not the question in the case at bar. We are dealing here with a question of the assessment and taxation of property subject to taxation and considering whether or not in respect to such property any such injurious discrimination is made.

In *Palmer* vs. *McMahon,* 133 U. S., 660, the statute of New York there challenged authorized and required assessment of shares of stock of all corporations, national as well as state. The revenue system there in question differs fundamentally from the revenue system of California where corporate property is alone assessable and the shares of stock of corporations are exempt from taxation. We have already pointed out the broad difference resulting from these two different methods of assessment and taxation. The decisions of this Court well illustrate this difference. Thus, in the *Bank of Commerce* vs. *New York,* 2 Black, 620-628, the Court say:

> "The capital of the bank is taxed under existing laws in that state upon valuation like the property of individual citizens, and not as formerly on the amount of the nominal capital, without regard to loss or depreciation.

> "According to that system of taxation it was immaterial as to the character or description of the property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change of this system, it is agreed the tax is upon the property constituting the capital.
>
> "This stock then is held by the bank the same as such stocks are held by individuals, and alike subject to taxation, or exemption by state authority. On the part of the bank it is claimed that the question was decided in the case of *Weston* vs. *City Councils of Charleston* (2 Peters, 449) in favor of exemption. In that case the stocks were in the hands of individuals which were taxed by the city authorities under a law of the state. The Court held the law imposing the tax unconstitutional. This decision would seem not only to cover the case before us, but to determine the very point involved in it."

The Court accordingly decided that the United States bonds owned by the bank were exempt from State taxation.

*Bradley* vs. *The People,* 4 Wall., 458.

To this rule the court has ever since adhered. In assessing the property of the corporation, therefore, it must be held exempt from assessment and taxation upon all its federal securities, whereas in assessing its stock to the shareholders, no such exemption is allowed.

*Owensboro National Bank* vs. *Owensboro,* 173 U. S., 664, 667.

In this last case the court demonstrate that assessment of the corporate property of the corporation is not the equivalent of the assessment of all its shares of stock in

the hands of its stockholders. The case, therefore, conclusively establishes that to the extent of the amount allowed for federal exemptions, there is and must necessarily be a discrimination between the two systems of assessment and taxation of the corporate property of the corporation and of the shares of its stock in the hands of the stockholders. Yet while professing to only impose the same burden of taxation upon the shares of the stock of national bank associations that are imposed upon individual citizens and corporations organized under the State law, the assessor refuses to allow them the benefit of federal exemptions that are allowed to such individuals and corporations. If this be not hostile discrimination violative of the rights of the stockholders of complainant, it is difficult to imagine what would be. The discrimination is patent.

Nor is there anything in *Supervisors* vs. *Stanley,* 105 U. S., 305, opposed to these views. In that and kindred cases the court held that stockholders entitled to exemption at their option upon making certain proof of their right thereto, could not, where they had failed to make such proof and to demand such exemption in the mode prescribed, afterward complain that they had not been accorded the same, and could not upon that ground successfully challenge the constitutionality of the law. Where, however, such demand would have been unavailing, either from want of disposition or of authority on the part of the officer to accord such demand, the rule is quite different, as declared in

*Hills* vs. *Exchange Bank,* 105 U. S., 327.

In *Whitbeck* vs. *Mercantile Bank,* 127 U. S., 199, the court declared that:

> "Under the decision in *Hills* vs. *Exchange Bank,* 105 U. S., 319, we are of opinion that the bank was entitled to relief in the cases of all the shareholders named in the bill (except James A. Barnett, Robert L. Chamberlain, and James Parmalee) and that the fact that they did not make an earlier demand for the deduction of their indebtedness from the assessed value of the shares of their bank stock does not defeat their right to have it made by this bill in chancery, for the reason that the court expressly finds that the laws of Ohio made no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock and provide no means by which said deduction can be secured."

Here the rights of the stockholders appear and the deliberate purpose to disregard them is shown. Through the corporation complainant its stockholders are entitled to invoke and assert all their legal and constitutional rights.

In regard to the provision of section thirty-six hundred and nine of the Political Code that:

> "In the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provisions of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California."

Turning to the provisions of the Political Code thus referred to, subdivision six of section thirty-six hundred and twenty-nine, it reads:

> "All solvent credits, unsecured by deed of trust, mortgage, or other lien on real or personal property,

due or owing to such person, or any firm of which he is a member, or due or owing to any corporation of which he is president, secretary, cashier or managing agent, deducting from the sum total of such credits such debts only, unsecured by trust deed, mortgage, or other lien on real or personal property, as may be owing by such person, firm or corporation to bona fide residents of this State. No debt shall be so deducted unless the statement shows the amount of such debt as stated under oath in aggregate; provided, in case of banks the statement is not required to show the debt in detail, or to whom it is owing; but the assessor shall have the privilege of examining the books of such banks to verify said statement. Whenever one member of a firm, or one of the proper officers of a corporation, has made a statement showing the property of the firm, or corporation, another member of the firm, or another officer, need not include such property in the statement made by him; but his statement must show the name of the person or officer who made the statement in which such property is included."

This right thus secured to the taxpayer applies alike to individuals and corporations. These are its terms. The stockholder in a State bank is entitled to enjoyment of this right. The bank corporation, of which he is a stockholder, is equally entitled to it. The discrimination in respect to national banks necessarily arises from the fact that while a stockholder in the national bank individually is entitled to this right, the national bank of which he is a stockholder is not, as that organization is not subject to these provisions of the Political Code. There is nothing in the language of section thirty-six hundred and nine already quoted vesting national bank associations with this right, or entitling the stockholder therein to the exercise thereof. There is thus a plain and

manifest discrimination between the two characters of banks. We are not now referring to cases where the legislature under its constitution may authorize and provide for exemptions, authorize or provide for different modes of taxation. We are speaking of cases where citizens embark in the same line of business, differing only in one respect,—one acting under State authority, and the other under the authority of the United States. In respect to such classes we submit there is a necessary and hostile discrimination.

*Palmer* vs. *McMahon,* 133 U. S., 660, may again be cited in this connection. That case is first reported in 11 Daly, 214, and well illustrates the difference that obtains in the various revenue systems of the different states. Palmer was assessed as a stockholder in a national bank. He had made application for a reduction of his assessment. He there claimed that he was entitled to a reduction of his assessment upon his national bank stock on account of the amount of federal securities held by the national bank of which he was a stockholder, insisting that the amount of such securities should not be considered in estimating the amount for which his stock should be assessed. He was granted a partial reduction by the state board having authority to do so. Under the system there prevailing, had he desired the further reduction upon which he insisted, a method was provided under which he could have reviewed the action of the board making the reduction and obtained a correction thereof. Instead of so doing he allowed the matter to rest there. He failed to pay the tax upon his assessment. In pursuance of the procedure established under the revenue sys-

tem of New York, steps were taken against him to enforce payment of the amount of the tax upon this assessment. To this proceeding he interposed various objections that are enumerated in the report. Among others, one that he had had no opportunity to be heard, in respect to which the court say that abundant provision was made for a hearing, and that he had been heard; and a further objection that the amount of Government bonds held by the bank was not deducted from the assessed value of the bank stock. In regard to this the court say (page 218):

> "The law is not unconstitutional because it has been improperly applied. In the Act of 1880 no limitations are made upon the power of the assessors to make such deductions as the law requires. They are directed to deduct the value of the real estate belonging to the bank. If other deductions should have been made, and they have not been made, the remedy of the party aggrieved is, as has already been suggested, to review the action of the assessors by certiorari; but such action cannot affect the validity and constitutionality of the act of the legislature from which they claim their power."

Upon the subject of a non-exclusion from the assessment of the bonds and federal securities so held by the bank, the court quote the language of Mr. Justice Wallace in the case of *Albany City National Bank* vs. *Maher* therein referred to, wherein the Judge adverts to the distinction there is between the property of the corporation and the property of the stockholder in his stock, upon this point saying (page 219):

> "Capital stock and shares therein are distinct species of property—as distinct as real estate and the mortgage by which it may be incumbered. The

corporation and its capital and property is one thing; the stockholders and their property in its shares, quite another.

"The corporation has the legal title and right of disposition of all the corporate property, subject to the conditions of its charter. The stockholder's right is to enjoy a proportionate part of the profits, or upon dissolution of the corporation a proportionate part of the assets after payment of debts. This is a distinct independent interest or property, held by the stockholder, like any other property that may belong to him. It is this interest which the National Banking Act has left subject to taxation by the states, while the states are denied the power to tax the capital stock of the banking association."

Upon which the state court remarks:

"The distinction which Mr. Justice Wallace points out between the property of the corporation and the property of the individual seems to have been recognized by the courts, and that such distinction exists in fact is apparent when the different rights and obligations of the corporation and the shareholders are considered as stated by Mr. Justice Wallace.

"The corporations own certain property. The corporation, as such, has the disposition and management of such property. The stockholder, as such, has no control of such disposition or management, except such as he may incidentally have by reason of his power to vote at an election for the directors or trustees of such corporations. The stockholder's interest is to enjoy a proportionate share of the profits of the business of the corporation. Over his shares the stockholder has absolute control. He may sell, mortgage, give away, or dispose of in any manner all his right, title and interest to those shares, and his right to share in the profits of the business of the corporation, provided it is done in the manner prescribed by the charter and by-laws of the corporation. These shares, therefore, seem to be distinct and independent properties held by the share-

holders, like any other property, such as bonds and mortgages, or promissory notes, and are, therefore, as distinct from the property of the corporation as the bond and mortgage is from the real estate by which it may be incumbered."

From this decision an appeal was taken and the case is again reported in 12 Daly, 363.

Speaking upon the point of notice and opportunity to be heard the court say:

"The objection that this proceeding is the first opportunity appellant has had to correct the assessment and taxation of his bank stock, is answered satisfactorily by the learned Justice in the court below. The fact of his having appeared and obtained a reduction is conclusive. * * * The objection that there should have been a reduction in the assessment of the proportionate part representing the investment of capital by the bank in government bonds, was considered and overruled in *Van Allen* vs. *The Assessors* (3 Wall., 573) and *The People* vs. *The Commissioners* (4 Wall., 244). It is difficult to cite illustrations from the different kinds of personal property, indicating the distinction between corporate shares and corporate capital. Nevertheless, the difference is apparent to the mental vision. The shares are held, bought and sold at pleasure. Their value is decreased or lessened by factors not directly affecting the capital. If the corporation pays dividends, the stock appreciates, if not, it declines. Share value depends upon the successful or unsuccessful use of capital and business management. Were there no difference between stock and capital, the valuation of the former would depend solely upon the increase or decrease of the latter. The value of any successful business may be far in excess of the capital invested, and the holder of corporate stock shares, possesses more than the right to a proportionate part of the corporate capital, *i. e.*, his *quota* of profit."

The case was thence taken to the Court of Appeals, the report of whose action is found in matter of application of

*McMahon* vs. *Palmer,* 102 N. Y., 176,

where the Court say:

> "It does not appear that there is any provision of law requiring the assessments of individuals for bank shares in New York to be made otherwise than in the mode adopted in this case, and in the absence of such provisions we do not see why the practice here pursued was not in harmony with the general regulations applicable to the subject, and did not afford to the appellant the same opportunity for correction and notice of the assessment in question that was given to all other tax payers of similar assessments in New York."

The action of the lower court was affirmed. It thus appears that under the revenue laws of New York all banks were treated alike, state and national. There was no distinction made between the state and national, either in rate or mode of assessment. These are the proceedings reviewed in

*Palmer* vs. *McMahon,* 133 U. S., 660,

where the text of the statute is given (p. 666).

The Court say:

> "We have decided that so much of the capital of national and state banks as is invested in United States securities cannot be subjected to state taxation, People vs. Commissioners of Taxes for New York, 2 Black, 620; Bank Tax Case, 2 Wall., 200; but that shares of bank stock may be taxed in the hands of their individual owners at their actual instead of their par value, People vs. Commissioners of Taxes, 94 U. S., 415; Hepburn vs. School Directors, 23 Wall., 480; without regard to the fact that part or the whole of the capital of the corporation might be

so invested; Van Allen vs. Assessors, 3 Wall., 573; Bradley vs. People, 4 Wall., 459; People vs. Commissioners, 4 Wall., 244; and that under acts permitting the deduction of debts from the value of all a person's taxable property, such deduction must be permitted from the value of such shares, People vs. Weaver, 100 U. S., 539, 546; but that a statute is not void because it does not provide for a deduction, nor is the assessment void if deductions are not made, but voidable only, Supervisors vs. Stanley, 105 U. S., 305. We have also held that individual instances of omission or under-valuation cannot be relied on to invalidate an assessment, Supervisors vs. Stanley, supra; and that because a state statute does not provide for the taxation of shares in corporations other than banks, it does not follow that the tax of moneyed capital invested in bank shares is at a greater rate than that of the moneyed capital of individual citizens invested in other corporations, nor are the shareholders in national banks discriminated against, because the taxation of such other corporations is arrived at under a separate system."

We have been thus particular in giving the history of this case in order to arrive at the correct value of the legal principles it establishes. The case establishes, among other things:

First: The right of the taxpayer to notice and opportunity to be heard in respect to his assessment. He is entitled to such notice, and without it proceedings to assess him would be void, as depriving him of his property without due process of law.

Second: All moneyed capital, whether invested in state or national banks, under the revenue laws there in question, were assessed in the same manner and at the same rate.

There was, therefore, no discrimination in this respect between State and national banks.

Third: Deduction was made from the assessment of a certain amount of federal securities held by the bank and the right to insist upon further deductions was not denied to Palmer, because he elected to abide by the assessment and did not pursue his remedy by certiorari to obtain such further reduction on that account as he claimed.

Fourth: That taxation of the corporate property of a corporation is one thing; taxation of the stock of the shareholders in that corporation is another and a different thing. That in assessing the former so much of the capital of national and state banks as is invested in United States securities cannot be subjected to state taxation. But that shares of stock in national banks may be taxed in the hands of their individual owners without regard to the fact that part or whole of the capital of the corporation might be so invested. Decision upon this last position was not required as Palmer had not put himself in a condition to call for its decision. Had he pursued his remedy by certiorari and being denied the reduction claimed, he would have been in a position to invoke decision upon the point.

This last proposition is exhaustively considered in *Owensboro National Bank* vs. *Owensboro*, 173 U. S., 664, in which the difference between taxation of the corporate property of a corporation and taxation of stock of the corporation in the hands of the stockholders is clearly pointed out, and distinctly declared the one not to be the equivalent of the other; in other words, the rule laid

down in *Burke* vs. *Badlam*, 57 Cal., 594, is in direct opposition to the rule laid down in *Owensboro National Bank* vs. *Owensboro*.

Under the federal rule where corporate property is taxed, deductions must be made. Where stock is taxed, deductions need not be made. The distinction is based upon the principle that in the first instance the tax is directly upon the federal security, etc. In the second the tax is not upon the corporate property, of which the federal security may constitute a part, but upon the interest of the stockholder therein regardless of the constituents of which such corporate property may consist. The rule was formulated as a criterion to determine when federal securities were exempt from state taxation, not for the purpose of determining the equality of the burdens of taxation, and that is the question here.

In all of the decisions of the federal courts upon the subject of taxation the rule is announced and enforced that the decisions of the State Supreme Court in expounding their constitutional and revenue laws are controlling, and that the Federal Courts will defer thereto. The rule announced in *Burke* vs. *Badlam*, has ever since its announcement continued to be the law of this State. The Legislature in 1881 conformed the revenue laws of this State on this subject thereto, distinctly declaring: "That shares of stock in corporations have no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also the corporate property would be double taxation. Therefore, all property belonging to corporations shall

be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor."

Every taxpayer of the State of California is entitled to the benefit of this rule, be he a shareholder in a State bank or in a National bank. The difference between this rule and the rule announced in *Owensboro National Bank* vs. *Owensboro,* 173 U. S., 664, is patent. Under the State rule, as we may call it for convenience, so much of the capital of National and State banks as is invested in United States securities cannot be subjected to State taxation. Under the federal rule the national bank stockholder is denied this exemption. Under the one rule a stockholder in a State bank can only be assessed upon the value of the corporate property of the corporation, after making all deductions for federal securities, etc., therefrom. Under the federal rule the national bank stockholder is assessed not only for the amount of this value, and also upon the value of the federal securities held by the bank, but upon that further element of value thus described by the court in

*McMahon* vs. *Palmer,* 12 Daly, 364:

> "Their value," (to wit, shares of stock) "is decreased or lessened by factors not directly affecting the capital. If the corporation pays dividends the stock appreciates, if not, it declines. Share value depends upon the successful or unsuccessful use of the capital and business management. Were there no difference between stock and capital, the valuation of the former would depend solely upon the increase or decrease of the latter. The value of any successful business may be far in excess of the capital invested, and the holder of corporate stock shares, possesses

more than the right to a proportionate part of the corporate capital, i. e., his quota of profit."

We thus see that a marked discrimination results against the stockholder in National banks in assessing them upon their shares, unless in so doing they are allowed all the exemptions and deductions to which the stockholder in a State bank is entitled. The mode or manner of assessment is not the material question so much as the forbidden discrimination that may result therefrom. This discrimination necessarily results from operation of the different revenue systems. It does not necessarily depend upon the mere allowance of right to the deductions allowed under subdivision six of section thirty-six hundred and twenty-nine of the Political Code.

Nor is there anything in *National Bank of Wellington* vs. *Chapman,* 173 U. S., 205, opposed to the positions here advanced. The pith of that decision is (page 217) that there was no showing of the amount of credits so that the Court could determine whether or not there was any injurious discrimination, the Court saying:

"The question recognized by the state court, therefore, remains whether there is any such discrimination?

"The chief ground for maintaining that there is, exists in the fact that the owner of what is termed 'credits' in the statute is permitted to deduct certain classes of debts from the sum of those credits, upon the remainder of which taxes are to be assessed, while the national bank shareholder is not permitted to deduct his debts from the value of his shares upon which he is assessed for taxation.

"It is claimed in substance that all credits are moneyed capital, and that they are large enough in amount, when compared with the moneyed capital invested in national banks, to become an illegal discrimination against the holders of such shares.

> "There is no finding of the trial court upon the subject of the total amount of credits in the state." * * * (page 219). "We are thus wholly prevented from ascertaining what proportion the moneyed capital of individual citizens, including in the term 'credits' (and from which some classes of debts can be deducted) bears to the amount invested in national bank shares. We are, therefore, unable to say whether there has or has not been any material discrimination such as the federal statute was enacted to prevent. We cannot see upon these facts any substantial difference between this case and that of *Bank of Garnett* vs. *Ayres*, 160 U. S., 660, and *Aberdeen Bank* vs. *Chehalis County*, 166 U. S., 440, and *Bank of Commerce* vs. *Seattle*, 166 U. S., 463."

In this case we are supported by a statement of fact which furnishes a demonstration of the discrimination against the shareholders in national banks.

The leading bank in the state was accepted as an illustration of the method universally followed. The Bank of California is known all over the world and we naturally assume that to this court its high and commanding place in the world of finance will be recognized. By the showing presented in this record it was possessed of taxable property according to the judgment applied in the case of the assessor of the City and County of San Francisco as follows:

| | |
|---|---|
| Real estate | $105,000 |
| Improvements thereon | 70,000 |
| Furniture | 1,000 |
| Library | 500 |
| Money | 2,135,224 |
| Typewriter | 50 |
| Franchise | 750,000 |
| Total | $3,061,774 |

In other words and as may be roundly stated the Bank of California had as assessable assets, including its real estate, three million dollars in value. Its capital stock is divided in twenty thousand shares, and it thence appears that to each share of stock the tax burden according to the doctrine of equivalency was at the rate of one hundred and fifty dollars. In the market the same shares were of the value of four hundred and five dollars (Record, page 80) and it thus appears that if we are to be relegated to the doctrine of equivalency and this case is to be decided upon the proposition that taxation of corporate property is the equivalent of the taxation of shares that in California the stockholders in the Bank of California and other commercial banks sustain a burden of taxation of one hundred and fifty dollars per share upon a market valuation of four hundred and five dollars per share or at the rate of 37 per cent of value while the National bank shareholder as shown in this case sustains a burden of one hundred dollars per share upon a valuation of one hundred and five dollars per share or in other words ninety-six per cent of the value. By the legislation now in force in California and against which we are now protesting it is thus made to appear and does appear that the shareholder in a state commercial bank through the taxation of his corporation sustains and pays a tax upon thirty-seven per cent of the value of his stock, while the unfortunate holder of shares in a national bank is mulcted at the rate of ninety-six per cent on the value of his shares. The wide variance between thirty-seven and ninety-six is certainly sufficient to establish and justify the claim of a discrimination which ought not to be allowed. When this

government decided to establish national banks it pursued a wise and broad purpose, and with the strong determination which marked all the steps of reconstruction the legislation in regard to national banks proceeded upon the proposition that no state should be allowed by its revenue laws to discourage investment in shares. California has always held out against the adoption and use of national currency, and until the present law was enacted has persistently refused to recognize her power to tax national bank shares. The general exemption from taxation of all corporate shares is the prevailing and accepted idea in California, and rather than abandon that idea the state has heretofore been willing to let national bank shares go free and even now and when it has become and is apparent owing to the growth of the state that national bank shares should be taxed the state still clings to its idols and insists on the right to tax national bank shares according to their value, while at the same time wholly exempting the shares of its own banks from taxation and claiming as its defense against such an unjust and unwarrantable discrimination that it does tax the corporate property of the state banks whereby the holder of shares in the state bank sustains a burden of about one third of that which is imposed upon the holder of national bank shares.

It should, however, be said that the claim made in the present case that taxation of corporate property is the equivalent of the taxation of the shares of the corporation has been generally repudiated.

This Court has said:

"To be equivalent in law, involves the proposition

that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the states to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decisions of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders."

Owensboro National Bank vs. Owensboro, 173 U. S., 677.

It would seem unnecessary to ask this court to read the citations given in its own opinion to sustain its conclusion, and we may for such reason rest in the assurance that this court will follow the course of decision which has been recognized at all times from the earliest cases; and if this view be recognized, as to us it seems it must, then it will be acknowledged that the taxation of corporate property is not the equivalent of the taxation of its shares, and the total exemption of the shares of commercial banks from taxation creates a discrimination against national bank shares in derogation of the plain terms of section 5219 of the Revised Statutes.

**The Legislative Enactment by its Express Provisions Exempts the Property in Question from Taxation.**

Section 3608 of the Political Code of California provides and declares that all of the property of national banks save real estate is exempt from taxation. That was a familiar and well-recognized rule and had been sustained in numerous cases. In 3609 it is provided that each shareholder in a national bank shall be entitled to deduct

his proportion of the property of the bank exempt by law from taxation. In other words, the whole body of shareholders entitled to deduct and claim as exempt from taxation the value of all the property of the bank which is exempt. This, as must be and is recognized, means that the shareholders are entitled to claim as exempt all the personal assets of the bank. There is and can be no question that the true reading of the language of the statute justifies our statement, and the only answer that is or can be made is that the legislature did not mean to enact any such thing; or in other words, that the legislature said and solemnly enacted one thing when it meant something wholly different.

We stand on the letter of the law. We humbly submit that this court will not make a law for the State of California, or by forced interpretation construe a statute to impose a tax where, by the ordinary reading of the language, none is imposed. There is no poetry in the measure of taxation. In the apt words of the Supreme Court of California, we can say:

> "Any attempt on the part of the state, or of the county as one of the subdivisions of the state, to take the property of an individual for public purposes by way of taxation, must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state. Whether his property is to be taken by seizure or by suit, the rule is the same. In the one case the officer must show his warrant for the seizure, and in the other the plaintiff must establish every fact essential to the maintenance of his right of recovery. In either case the proceeding is *in invitum*, and no presumption is to be indulged in favor of the right to take the property, or of any intention that is not distinctly expressed in the statute under which it is sought to be taken. (Sutherland on Statutory Con-

struction, sec. 363; Monterey Co. v. Abbott, 77 Cal. 541; Camden v. Allen, 26 N. J. L. 398; Sewall v. Jones, 9 Pick. 412). A tax can never be extended by construction to things not named or described in the statute as the subject of taxation. It was said by Lord Cairns in Partington v. Attorney General, Law Rep. 4 H. L. 122: ' The principle of all fiscal legislation is that, if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where *you can simply adhere to the words of the statute.*' "

Merced County vs. Helm, 102 Cal. 159-165.

We cite the foregoing with confidence that it is a true statement of the law, and if it be accepted, then the present case must follow the rule thus declared, and it must be held that the shareholders of the appellant bank were entitled to deduct from the value of their shares all the property exempt from taxation, and if such be the conclusion then it will be admitted, as it necessarily must be, there was nothing left to assess.

Respectfully submitted,

E. S. PILLSBURY,
ALFRED SUTRO,
LLOYD & WOOD,
Solicitors for Appellant.

W. S. WOOD,
Of Counsel.

IN THE

# Supreme Court of the United States.

October Term 1904.

No. 44.

THE SAN FRANCISCO NATIONAL BANK,

*Appellant,*

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO,

*Appellee.*

## Brief in Reply.

In the statement of the case, by an inadvertence we omitted to set forth certain portions of the Political Code of California, to which reference was made in the brief, and we now insert the same.

Title IX of Part III of the Political Code, beginning with Section 3607 and ending with Section 3899, treats of "Revenue," and therein will be found the entire tax system of the State.

> "Section 3617. DEFINITION OF TERMS. Whenever the terms mentioned in this section are employed in this act, they are employed in the sense hereafter affixed to them: * * *

Fourth. The term "personal property" includes everything which is the subject of ownership, not included within the meaning of the term "real estate" or "improvements."

Fifth. The terms "value" and "full cash value" mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor.

Section 3627. PROPERTY, HOW ASSESSED. All taxable property must be assessed at its full cash value.

Section 3635. ASSESSMENT OF UNKNOWN OR ABSENT OWNERS OF PROPERTY. If the owner or claimant of any property, not listed by another person, is absent or unknown, the assessor must make an estimate of the value of such property.

Section 3641. PROPERTY OF FIRM OR CORPORATION ASSESSED WHERE SITUATED. The property of every firm and corporation must be assessed in the county where the property is situate, and must be assessed in the name of the firm or corporation.

At the time the assessment considered in Miller vs. Heilbron, 58 Cal. 133, was made, Section 3640 read:

"Each person, firm, or corporation owning or having in his or its possession any of the shares of the capital stock of any corporation, association, or joint-stock company, shall be assessed therefor. If the corporation, association, or joint-stock company has its principal place of business in this State, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which its capital stock is divided. The owner or holder of capital stock in corporation, associations, and joint-stock companies whose principal place of business is not within the State, must be individually assessed for such stock. Sharehold-

ers, in the statement required by Section 3629 of this code, shall specify the number of shares of stock held by them, and the name of the corporation. The owner of shares of stock, to be entitled to the reduction provided for in this section, must produce to the Assessor a certificate of the assessment of the property of the corporation, association, or joint-stock company." (pp. 137-138.)

It is also thought proper to insert the entire text of Section One of Article XIII of the Constitution of California:

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; provided, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits or debts due to bona fide residents of this State."

In the opening brief attention was called to the first important point involved in this appeal. We then said that our attack upon the law in question was at the outset founded upon the proposition that the taxation of national bank shares and the exemption of commercial State bank shares created an unlawful discrimination in violation of the provisions of Section 5219 of the Revised Statutes, and we claimed that the taxation of the corporate

property of the State banks did not avoid the objection for the reason that as matter of law the taxation of the corporate property is not the equivalent of the taxation of the shares.

The brief of the counsel for appellee calls in question not only the reasoning of the opening brief, but also the pertinency of the authorities cited in its support. The argument of the counsel for appellee proceeds generally upon the proposition that this Court will not interfere with the action of the State if it appears that under its system, as interpreted by its Courts, the taxation of the two classes of property in the mode provided is equal. Without conceding the proposition, we may yet consider whether the Courts of California have interpreted its revenue system so as to give it the meaning attributed to it by counsel.

The case of Burke vs. Badlam, 57 Cal. 601, is the authority furnished to support the contention. The Court will read the case in vain to find any expression of opinion on the point involved. Nowhere in that case is it said that the "full cash value" of a share of stock in a commercial banking corporation is fixed or determined by the value of the corporate property. The Court could not have said any such thing, because common knowledge and experience teach us the opposite. The Court did say that when all the corporate property was assessed, then the shares were assessed. That may be conceded and yet it does not follow that if the shares were assessed as such, the valuation would be that placed on the corporate property. The Court was dealing with a question of double taxation, not with one involving the equivalency

of value, and it held that the corporate property and the shares were so closely united that to tax both would be double taxation. That was the only question before the Court and was the only one decided, and we submit that the opinion should be read in view of the question under consideration, because, as will be seen, such is the only way in which the Court can be saved from a clear and manifest inconsistency; and when read as we suggest this Court will we submit fail to find any rule declared which can be said to sustain the present statute of the State.

But if as claimed by counsel, it be true that the Court in Burke vs. Badlam, did hold that the shares were the taxable equivalents of the corporate property, then, as will be seen hereafter, that Court is brought into direct conflict with itself and with the highest tribunal of the land and the one before which this cause is pending.

Owensboro Nat. Bank vs. Owensboro, 173 U. S. 664.

The case of Burke vs. Badlam (supra) was decided in the month of January, 1881. In May, 1881, the same Court, composed of the same Judges, decided the case of

Miller vs. Heilbron, 58 Cal. 133.

In that case the Court was called to and did pass upon the precise and identical point with which we are now concerned. The question there was as to the validity of a law designed to authorize the taxation of national bank shares.

Section 3640 of the Political Code of California, as it stood when Miller vs. Heilbron arose, provided as stated

by the Court, "for taxing his shares to each person owning any of the shares of the capital stock of any corporation, association or joint stock company—including incorporated National Banks." It provided further that the assessable value of each share should be ascertained by taking from the market value of the entire capital stock of the corporation the value of *all property* assessed to the corporation and dividing the remainder by the entire number of shares."

Realizing that the Court would probably, as it did hold that the law created a discrimination unfavorable to the holders of national bank shares, the Attorney General was driven to take the exact and precise position which is here assumed by counsel for appellee. The attention of the Court was called to the rule behind which the supporters of unjust taxation always endeavor to shield themselves, that mere inequality, however gross, does not authorize relief; and then he proceeded to argue that inasmuch as all the personal property was assessed to the corporation, and as the shares represented and stood for the corporate property, an equivalency was established. In concluding his brief, the Attorney General of California said:

> "In this case it was the object of the State to collect revenue upon the full value of all the shares of the bank, as it does upon all other classes and kinds of property. This it was authorized to do by the Act of Congress, and it makes no practical difference to the shareholders of the several classes of corporations, whether they directly pay the whole of the tax upon the full value of the shares, or whether a portion of it is paid in some other form, by the corporations, and deducted from the dividends of the shareholders."

That we submit is the proposition on which counsel for appellee now rests.

In considering the argument, the Supreme Court of California said:

> "It is no sufficient answer to this suggestion to say that, by the State law, the personal property belonging to a State bank was assessed to the bank, and so the tax thereon was indirectly paid by the individual shareholders. The restriction of the United States statute is, that the taxation to the individual 'owner or holder' of shares of a National Bank shall not be at a greater rate than is assessed upon any other moneyed capital 'in the hands of individual citizens of the State.' It would be a strained interpretation of the statute to hold that a proportionable part in value of the personal property belonging to a State bank, and assessed to it, was 'in the hands' of an individual shareholder in such bank. It was in the power of Congress to confer upon the State the right to tax shares in National Banks with any limitations deemed proper. It has conferred the right to tax each individual owner of such shares, provided such taxation is not at a greater rate than is imposed upon any other individual who has moneyed capital invested in any other manner. (58 Cal. p. 141.)

Further along in the opinion, the Court also said:

> "If the code had provided that the value of all the shares of a National Bank should be assessed to such bank, the provision would be in excess of the power conferred by the act of Congress, and could not be upheld upon the propostion that the tax was indirectly imposed upon the shareholders. Without doubt, then, the act of Congress by its terms recognizes a distinction between taxation to the bank and taxation to the shareholders. The former is prohibited, the latter is permitted. So far as corporations

> are concerned, the subject of taxation, in respect to which the taxation must be ratably the same, are *the shares* of National Banks and *the shares* of State corporations—in such case 'in the hands of individuals.' *In view of the language employed in the act of Congress, a tax imposed upon a corporation is not the equivalent of a tax imposed upon its shareholders.*"

In view of the foregoing language, we submit that it is not doing justice to the Judges of the Supreme Court of California to say that in January they deliberately decided as correct law a proposition which they as deliberately repudiated in the following May; but if the cases are opposed, then of course the last must be accepted. But the two cases should be regarded in view of the questions involved, and when so regarded, there is no conflict, and taking the case in which was directly involved the point here in discusson, we find the Supreme Court of California placing itself squarely upon the doctrine for which we are contending.

"In view of the language employed in the Act of Con-"gress, a tax imposed upon a corporation is not the "equivalent of a tax imposed upon its shareholders." That proposition has never been denied or doubted in the Supreme Court of California, but has always been followed. In the latest case before the Court, the concluding sentence of the opinion reads:

> "In Owensboro Nat. Bank vs. Owensboro (supra) the Court held that the contention herein urged, that a tax against the bank upon its personal assets was equivalent to a tax upon its shares, was untenable."
>
> First National Bank vs. San Francisco, 129 Cal. 96-98.

The Supreme Court of California has been consistent and in the last case upon the point has adhered to the ruling made in the first one where it was raised. Hence, it must follow that if, as claimed by counsel, this Court is to take as its guide the Supreme Court of California, then we stand upon safe and sure ground. But to us it does not appear necessary that this Court should be required to determine the status of the rule in California or elsewhere, when it has itself and in an exhaustive opinion settled the question.

Owensboro Nat. Bank vs. Owensboro, 173 U. S. 664.

It will not be needful for us to go at length into a discussion of the questions decided in this case, because the counsel for appellee agrees with us that the Court did there hold that the assessment of the tangible property and franchise of a bank was not the equivalent of the taxation of its shares. (Brief of appellee, p. 37.)

However, it may be said that in Kentucky, the State dealt with, the property of the National and State Banks, as in Ohio, was done with the shares, and in the first instance the law was held invalid because the shares were not taxed. Had the course adopted in Ohio been followed in Kentucky, the result would probably have been different. In Kentucky, all banks, both State and National, were treated alike. There was no discrimination in fact. All were made to submit to precisely the same procedure. They were required to file with the Auditor certain statements showing, among other things, the amount of capital stock, the number of shares, the amount of stock paid up, the par and real value thereof, the highest price at

which such stock was sold at a bona fide sale within twelve months next before the fifteenth day of September of the year in which the statement was required, the amount of surplus fund and undivided profits, and the value of all other assets, the total amount of indebtedness as principal, the amount of gross earnings, or income, including interest on investment and income from all other sources for twelve months next preceding the fifteenth day of September, the amount and kind of tangible property in the State and where situated, assessed or liable to assessment in the State and the fair cash value thereof (see note, pp. 671, 674). Supplied with this statement from every State and National Bank, the taxing officers proceeded to fix and determine the assessable value of the property of each of such banks.

This Court held the law invalid because repugnant to the provisions of Section 5219 of the Revised Statutes.

That the question was broadly treated and not decided as it might have been upon a bare statement of the Act of Congress will be seen from the manner in which this Court approached its consideration. It is said:

> "It is, however, urged that whilst the taxes may not be in form imposed on the shares of stock in the names of the shareholders, and may be in form a tax on the franchise or property of the bank, nevertheless they are equivalent to a tax on the shares of stock in the names of the shareholders, and therefore do not violate the act of Congress. But this proposition concedes that the taxing statute does not conform to the act of Congress, and yet invokes its permissive authority, since, as already shown, without the grant made by the act of Congress there would be no power to tax at all. Passing, nevertheless, this contradiction, and looking beneath the mere form,

we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements —equivalency in law and equivalency in fact. Does it contain either? is the question." (p. 676.)

And thereupon the Court proceeds to say:

"To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the States to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decisions of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders."

In commenting upon the case of Van Allen vs. Assessors (3 Wall. 573), the Court said:

"The other question in the case was thus stated by the Court, through Mr. Justice Nelson, page 581:

"'The main and important question involved, and the one which has been argued at great length and with eminent ability, is, whether the State possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States.'

This question was examined, and it was decided that, as the shares of stock in the hands of the shareholders were distinct and different subjects-matter of taxation from the property or rights of the bank, that therefore the power conferred by Congress

should be exercised so as to tax the shareholders even although the property of the bank was invested in non-taxable bonds of the United States, because the two were distinct and different things.

It is to be remarked that it is patent from the opinion of the court that, if the shares of stock had been considered as in anywise the equivalent of the bonds, in which the property of the bank was invested, the tax would have been held invalid, despite the authority to tax the stock given by the act of Congress, as such authority would not have been construed as authorizing a violation of the faith of the United States by taxing bonds issued by the Government which were not subject to taxation."

Referring to the cases which will be found in the brief of appellee and upon which counsel relies, it is said:

"It has been suggested that other cases decided since the cases referred to, whilst not questioning the latter, in effect admit a doctrine which tends to a contrary result. We do not stop to review in detail the cases from which this result is claimed to arise. They are

Palmer v. McMahon, 133 U. S. 660;
Bank of Redemption v. Boston, 125 U. S. 60;
Davenport National Bank v. Davenport Board of Equalization, 123 U. S. 83;
Mercantile Bank v. City of New York, 121 U. S. 138.

"It suffices to say that the claim is devoid of foundation. In all the cases referred to the taxation was specifically imposed on the shares of stock in the name of the shareholders, and the question presented, in various forms, was whether the provisions of state taxing laws, created a discrimination in favor of other moneyed capital and against the shareholders in national banks, contrary to the act of Congress. On these questions, interpreting the act of Congress with the liberality of construction resorted to in the *Van Allen case* and those which

followed it, the court in most of the instances rejected the charge of discrimination. The result of the cases in question tended to give efficient vitality to the grant of Congress to tax the shares of stock in the names of the shareholders. The argument now relied on would, if it were adopted, operate to destroy the power to tax, which the act of Congress sanctions.

"It cannot be doubted that, as a general principle, it is settled that the taxation of the property, franchises and rights of a corporation is one thing and the taxation of the shares of stock in the names of the shareholders is another and different one. This doctrine has been applied to sanction the taxation of the one where the other was covered by a contract of exemption. As the result of its application, it is unquestioned that much property has been brought within the range of the taxing power which otherwise would have escaped taxation. It is unnecessary to multiply citations on this subject, as the question has been in recent cases reviewed and restated fully by the Court. Thus in *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146, it was said, through Mr. Justice Peckham:

" 'The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. (Van Allen vs. Assessors, 3 Wall. 573; People v. Commissioners, 4 Wall. 244, cited in Farrington v. Tennessee, 95 U. S. 687.)' " (pp. 680, 681.)

And on the point the Court concludes in these words:

"This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax

and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration." (p. 683.)

The views of the law which we find expressed in the foregoing are of course accepted by counsel on both sides of this case, and we only differ in the matter of their application.

We submit and respectfully insist that it is plainly and squarely held by this Court that as *matter of law* shares of stock in a banking corporation are not the taxable equivalents of the corporate property. In other words, one cannot be taxed for the other. Unless we read the opinion without understanding, it is held that in taxing the corporate property of a national bank, the shares are not taxed, and from that it must follow that in taxing the corporate property of a State bank, its shares are not taxed directly or indirectly.

If it be the true doctrine, as held by this Court, that by taxing the corporate property of National banks, its shares are not reached and are wholly exempted, then the same result must follow in regard to a State bank when the same thing is done. Then it will be seen that two things are shown to have occurred in California; in the year 1900:

1. The shares of all national banks in the State were valued, assessed and taxed at their "full cash" or market value;

2. The shares in commercial State banks amounting in value to thirty million dollars, and being investments brought into competition with the national bank shares,

were not taxed and were by reason of the statute wholly exempt (Record 81).

We mention these facts to show that the law in its operation fosters and creates a material discrimination unfavorable to national banks and tending to discourage investments in their shares contrary to the policy of Congress.

We desire, in closing our observation on this point, to cite

Adams Express Co. v. Ohio, 166 U. S. 221.

> "Suppose an express company is incorporated to transact business within the limits of a State, and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that State, so uses the tangible property which it possesses, so transacts business therein that its stock becomes in the markets of the State of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation." (p. 221.)

And with much greater cause of complaint can it be said that a shareholder in a national bank in California with his shares taxed at their full market value, viewing the happy state of his neighbor, a shareholder in a State

bank who sustains only a burden fixed according to the value of the corporate property may sadly "feel the injustice of a system which so misplaces the burden of taxation." And we entertain no doubt that "accumulated wealth" represented by the favored holders of shares in the State banks of California "laugh at the crudity" of its taxing laws.

Let it be suposed that instead of an express company it is a banking corporation whose corporate property is valued at a given amount, yet because it "so uses the tangible property which it possesses, so transacts business therein that its stock becomes in the markets of the State of the actual cash value" of millions of dollars in excess of the value of the corporate property. Would the rule of law be any different than that which the Court declares to obtain in the case of the express company? We submit that in both cases the rule will be the same.

It is submitted that sufficient appears to establish the invalidity of the law in question. When we come to consider the question as to whether or not, under the law of California, there is and must be an equivalency in fact, or a want of it, we are able from the record to make out, not only an entire want of any such equivalency, but a case of an onerous and unwarrantable descrimination to the disadvantage of the national banks and their shareholders. The contention of appellant is that under the system of assessment provided by Sections 3608 and 3609 of the Political Code of California, national bank shares are made to bear an unequal and unjust share of the burden of taxation because, in the first place, the

Assessor is required to start in an exactly different way in ascertaining directly the assessable value of national bank shares from that which he is obliged to follow to fix indirectly the tax burden on State bank shares; and because, in the second place, by the mode adopted in California a material discrimination must result between the burdens imposed upon the two classes of property growing out of the valuation of the one class and the total failure to value the other. And finally, that the record in this case shows conclusively that the shares of appellant suffered by reason of a discrimination which was systematically practiced in the City of San Francisco, and whereby State bank shares were largely favored even if it were conceded that the indirect mode of taxation could be sustained as an equivalent to the correct and only legal way of taxation.

In support of this contention we claim that in attempting to arrive at the semblance of an equality of taxation upon national bank shares and State bank shares, the Assessor cannot and is not allowed to start from the same point. He is obliged to begin his investigations at widely different angles. In the case of national bank shares, he is to find at the outset the market value of the property to be assessed, and in the case of State bank shares, he is to disregard any value they may possess and value other property, and thereby and in a roundabout way, impose a burden of taxation upon such shares.

In 1864, the State of New York maintained a tax system very much like that now existing in California. Shares of national banks were assessed at their par value, while the State banks were assessed upon their capital.

This would seem at first blush to provide for precise equivalents. The par value of the national bank shares would naturally be the amount of the capital. The courts of New York sustained the enactment, but this Court held it a nullity.

Van Allen vs. The Assessor, 3 Wallace, 573.

The reason given in the opinion is in effect that upon which we here rest in our resistance to the California statute, namely, that the assets of the State banks may consist in whole or in part of non-taxable things, and by reason of that fact the equality would and could not be preserved when national bank shares continued to be assessed at their value without regard to the character of the property in which the capital of the bank might be invested.

In New York, after several years of litigation, it was concluded advantageous to follow the true and only course and accept the evident intention and expectation of Congress when it enacted the provision now known as Section 5219 of the Revised Statutes, and then it was enacted as follows:

> "The stockholders in every bank, banking association or trust company organized under the authority of this State, or of the United States, shall be assessed and taxed on the value of their shares of stock therein."

It is to this condition of its revenue laws we claim the State of California must submit before it can lawfully impose any tax burden upon national bank shares. California stands alone in its obstinate refusal to abandon a system of assessment which has yet to find support in

any decision of this Court, and which has been abandoned by every other State in the Union.

The point we are just now endeavoring to bring to the attention of the Court may be illustrated by a consideration of the provisions of the law of Ohio, considered in Bank of Wellington vs. Chapman, 173 U. S. 205.

In Ohio, both national and State bank shares are assessed; but to arrive at their assessable value it is in effect provided that the assessable value of the shares of both classes of banks should be reached by a comparison with a sworn statement of their resources and liabilities. Hence and under the Ohio system, the two are placed on a substantial equality at the start. In arriving at the assessable value of the shares, both are placed on the same footing; and this Court, in the case last cited, well said that the statute of Ohio was to be considered as having been enacted "with no view to discriminate "against the holders of shares in national banks and with "the taxation of the shareholders in the two classes of "banks, State and national precisely the same." (pp. 214-215.)

The reason why the taxation of the shareholders in the two classes of banks in Ohio is precisely the same and hence no discrimination is created or fostered against national banks shares is because the basis for assessment is the same for both classes.

The difference between the Ohio system and that of California must be evident. In Ohio, as to both classes, the assessable value of the shares is the difference between the resources and the liabilities. In California, as to national banks, it is the difference between the market

value of the shares and the liabilities; and as to State bank shares, by indirection the difference between the resources and liabilities. And if, for any cause, a national bank share acquires a value in the market beyond the difference between the resources and liabilities of the bank, it must be valued and assessed at a higher rate than that which will be borne indirectly by the State bank share.

In arriving at the assessable value of a national bank share, the Assessor has certain well defined guides:

1. It must be valued and assessed as is other property. (Pol. Code, Sec. 3609);

2. It must be assessed at its full cash value. (Pol. Code, Sec. 3627);

3. By "full cash value" is meant the amount at which the property would be taken in payment of a just debt from a solvent debtor; that is to say, the market value, or the value of the share in the open market. (Pol. Code, Sec. 3617, Sub. 5.)

Hence, if the full cash value of a national bank share should be three hundred dollars, it must be valued at that sum, notwithstanding the fact that the difference between the resources and liabilities of the bank would show, as in the case of the indirect assessment of a State bank share, a value of only one hundred and fifty dollars.

That a bank share is a distinct property, separate and apart from the assets of the corporation from which it emanates, is not only a conclusion reached by reason, but is the conclusion of this Court.

In the Van Allen case (supra), this Court said:

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital during the existence of its charter, in proportion to the number of its shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation, after the payment of its debts.

*This is a distinct, independent interest or property held by the shareholder like other property that may belong to him.*

Now it is this interest which the Act of Congress has left subject to taxation by the States under limitations prescribed" by Section 5219. (3 Wallace, 584.)"

(The italics are ours.)

In a much later and recent case, this Court, in speaking of a Statute of Utah where "true value" is the basis of assessment, said:

> "The true criterion as fixed by the Statute is the true value of the stock without reference to the question where or in what manner or nature of property the capital stock may be invested."
>
> Bank vs. Chambers, 182 U. S. 561.

Reading the two foregoing statements of the rule together and applying them to California, we observe that a share of national bank stock is to be treated as a distinct, independent interest or property to be valued for tax purposes at its market value, without reference to the question where or in what manner or nature of property the capital stock may be invested.

The share of a State bank is not, as such, assessed or taxed at all in California. In that State that kind of "distinct independent interest or property held by the

"shareholder, like any other property that may belong to "him" is wholly and absolutely free and exempt from taxation.

Thirty millions in value of such property, namely, State bank shares in California, coming into competition with Appellant bank enjoy this immunity from the burdens of State and municipal government. This splendid generosity on the part of the State redounds to the advantage of its own, while it hampers and retards the creations of the Nation.

Confronted with the system of taxation of California, we have no cause to further wonder why it is that the shares of appellant have only a full cash value of, and would only be taken in payment of a just debt from a solvent debtor at the sum of one hundred and sixteen dollars per share, or sixteen dollars above par, while the shares of its indulged and pampered neighbor in the same street and next block, the Bank of California, under exactly the same mode of valuation, are worth four hundred and five dollars per share, or three hundred and five dollars above par.

In California, the conditions are practically those of which this Court spoke in Bank vs. Chehalis, 166 U. S. 440:

> "A tax upon the money of individuals invested in the form of shares of stock in national banks would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of State laws were exempt from an equal burden."

The revenue system of California is, we submit, accurately described in the foregoing language, and its result is to establish and sustain a taxation which creates and fosters an unequal and unfriendly competition by favoring State institutions as against national institutions carrying on a similar business and operations and investments of like character. And when we stop to think that Government Bonds bearing interest at the rate of two per cent per annum, sell readily in the market at one hundred and five dollars each and thus give the purchaser interest at about one and eight-tenths per cent per annum, we must conclude that the saving of one and six-tenths per cent per annum would naturally and necessarily render one class of investment a favorite over another; and yet that is the stern fact with whch we are confronted in this case.

The rate of taxation in San Francisco for State and municipal purposes was one and six-tenths per cent and a little more (Record, page 79). The shares of appellant were assessed and taxed at their "full cash" or market value. The shares of State banks were not assessed or taxed and were exempt, but were indirectly assessed for a portion of the value or about 80 per cent.

Thus it appears that State bank shareholders enjoyed an advantage over National bank shareholders of about one per cent per annum interest upon their investments, which is certainly more than sufficient to justify the claim of discrimination.

In the Whitbeck case, 127 U. S. 193, a difference in valuation between sixty and sixty-five per centum valuation was held to be sufficient to establish a discrimination.

We would not be here complaining if our case did not present an altogether more glaring case of favoritism.

The points of departure in the matter of the valuation for taxation purposes of the two classes of property being different, the courses thereafter followed must and do constantly diverge.

Bank shares have two values: one is termed "Book Value"; another is termed "full cash or market value." This fact is generally recognized and acknowledged, and by reference to the statement set forth in the brief of appellee (pages 47-48) it will be seen that counsel and ourselves agree upon the existence of the different values.

"Book value" of a share of stock is the amount shown by dividing the sum of the net resources by the whole number of shares. To illustrate: The appellant has net resources amounting in value to $581,911.32, and that sum divided by 5,000, (the whole number of its shares) gives $116.38, as the "Book value" of each of such shares. The Bank of California, as shown by the record, has net resources of the value of $5,906,403.08, and that sum divided by 20,000 (the whole number of its shares) gives $295.32, as the "book value" of each of said shares; but if we add to the above amount the value of the franchise, then the book value of each share of stock of the Bank of California will be increased $37.50, or to the sum of $332.82.

Under the Ohio revenue system and which this Court in Bank of Wellington vs. Chapman (supra) pronounced consonant with the provisions of section 5219 of the Revised Statutes, the shares of the appellant bank would

have been valued at $116.38 each, and the shares of the Bank of California at $295.32, or it might be at $332.82.

"Full cash" and market value import the same thing.

"The phrases 'salable value,' 'actual value,' 'cash value,' and others used in the directions to assessing officers all mean the same thing."

Cummings vs. National Bank, 101 U. S. 162.

"The market value of goods is the price at which the owner of the goods, or the producer holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade."

Cliquot's Champagne, 3 Wallace, 125.

The market value of property then means the price at which it is bought and sold in the open market, that is to say its "salable value."

The cash or market value of a share of stock in a banking corporation should never be less, but usually exceeds the book value. Whether, and to what extent, the market value exceeds the book value depends upon many considerations. To some of them we have already called attention in the opening brief; but it may be said further that the shares of one bank will have a market value over those of another, because of the fact that the one is a bank of long standing, high credit, and known everywhere, and although its dividends may not exceed those of a more recently established and not as well known bank, yet, as a matter of common knowledge, we recognize that the shares of the older bank will be sought as

an investment in preference to those of the younger institution. Good name, to banks (though without souls) as "to man and woman born," is ever the "immediate jewel."

In this present record, we find an apt illustration of the fact just mentioned. As we have shown, the book value of the shares of the Bank of California, including the full cash value of the franchise, is $332.82 each; but we know, and it is conceded and agreed, that the market value of the shares is $405 each (Record p. 80). The cause for this discrepancy would not be hard to find. The Bank of California is the leading financial institution of the Pacific Coast States. Its reputation is of the highest possible order; its credit is beyond question; its business is extensive, and naturally, its stock is sought by investors and that fact enhances the price in the market.

The appellant bank is a much smaller concern, of more recent origin, not as well known or as thoroughly advertised as its big competitor across the street, and naturally its shares do not command the same price in the market. Again, and as we have already pointed out, the shareholders in the Bank of California enjoy an immunity from the taxation to which the holders of the shares in the appellant bank are subjected.

It has been frequently held that elements other than the assets enter into and aid materially in creating the market value of the shares of a corporation.

> "In Com. vs. Hamilton Mfg. Co., 12 Allen, pp. 302-303, the Court say:
>
> "'Undoubtedly the amount of property belonging to a corporation is one of the considerations which

enters into the market value of its shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospect of its future success, the nature and extent of its corporate rights and privileges and the skill and ability with which its business is managed.'

And again on page 304:

"'These illustrations serve to show that an assessment based on the market value of the shares of a corporation or of the aggregate of said shares or capital stock cannot be properly deemed a tax on the property of the corporation.'"

"In Commonwealth v. Hamilton Mfg. Co., 12 Allen 302, 304, it 's said:

"The price for which shares are sold does not depend on the value or amount of property belonging to a corporation, but rather on the capacity of the corporation to use its property in connection with its corporate powers and privileges advantageously and profitably, and upon the present prosperity, prospective earnings and probable final results of the corporate business. It would seem to follow from these views that the valuation which the public put on the stock of a corporation as shown by sales and purchases of the shares, cannot be justly regarded as a valuation of the property of the corporation.'

"In People v. Barker, 59 N. Y. Supp. 926, 941, the Court said:

"'The capital stock of a company is one thing; that of the shareholders is another and different thing. That of the company is simply its capital, existing and tangible capital but also of surplus of the stockholders is representative, not merely of that existing and tangible capital but also of surplus of dividends earning power; of franchise and the good will of an established and prosperous business."

If it be true as claimed by Counsel that the Supreme Court of California has decided that the "franchise" fills the gap between the market value of the shares and the value of the tangible assets and must be so valued, then we say, with all due deference that the Court has simply undertaken to repeal an Act of the Legislature. The Statute does not say that the franchise shall be valued at any stated or arbitrary sum; nor does it say that the market value of the shares shall be considered in the matter, but it does say that all property shall be valued at its full cash value and full cash value is the sum at which the property would be taken in payment of debt, and if the Court has assumed the power of directing the assessors to pursue any different course it has done a vain and idle thing, but again we say that if the consideration did not arise it would still remain that the ruling of the California Court will be found opposed to the whole current of authority. We have already cited to this Court several cases showing that a number of elements other than franchise enter in the increase of the market value of the shares over and above the value of the corporate assets.

In this Court it has been said that while the franchise is one of the things that enter into the computation of market value, "the probable prospective capacity for "earnings also enters largely into the market value and "future possible earnings again depend to a great extent "upon the skill with which the affairs of the Company "may be managed. These considerations, while they "may enhance the value of the shares in the market, yet "do not in fact increase the value of the actual property

"itself. They are matters of opinion upon which persons "selling and buying the stock may have different views."

Pullman Co. vs. Transportation Co., 171 U. S. 154-5.

In a former case this Court said:

> "The capital stock of a corporation and the shares of a joint stock association represent not only tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern."

Adams Express Co. v. Ohio, 166 U. S. 221.

And in the absence of authority, it would seem wholly too narrow a view to say that the franchise alone furnishes the cause for the market value of shares. We all recognize that to a bank credit, or in other words, the reputation of its solvency and probity which entitles it to be trusted, is the dominant and accepted factor in determining the market value of its shares, and without credit its shares are without value over and above the sum that would be paid in liquidation. This reputation is sometimes called good will, but by whatever term designated, it is after all that element which gives to the bank a standing and makes its shares an inviting investment.

In view of these holdings, it does not seem necessary to pursue further the citation of authority to establish the fact that the Supreme Court of California is either in error or misunderstood by counsel.

These considerations show why it occurs that the shares of the Bank of California have a market value far in excess of the book value. We submit that a

like state of fact exists as to all the commercial banks of San Francisco, and that such is a fair inference and conclusion from the agreed statement. (Record p. 80.)

Viewed in the most favorable light and granting everything claimed for it, the conclusion seems irresistible that in assessing the corporate property of a State commerical bank, the Assessor must and is confined to the ascertainment and valuation at their market value of the assets of the bank. He is presumed to do his duty, and so doing, he cannot place any other or higher valuation upon the corporate property. He is not concerned with the market value of the shares of State banks. Whatever that value may be, it does not enter into his calculation. As a matter of fact and when making the assessment, the Assessor does not reach the book value.

Banks usually own real estate, and in their statements and in the consideration of dealers in their stocks, such real estate is figured at is market value and should be so assessed.

The remarks of this Court in Cummings vs. National Bank, (supra) apply with particular force in California.

> "The constitutions and the statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed." * * * "But it is a matter of common observation that in the valuation of real estate, this rule is habitually disregarded." (p. 162.)

And it is pointedly exhibited in this record.

In the statement of its resources designed for the study of the public and its present and prospective shareholders, the Bank of California valued its real estate at the

sum of $543,629.27 (Record, p. 80); but, when the appellee came to ascertain and assess the same real estate, its value had shrunk to $175,000, or less than thirty per cent of its value as given in the bank statement.

The value of the real estate given in the Bank statement was that which entered into and constituted a factor in determining the market value of the stock of the Bank of California. Buyers paid for the stock on the basis of value for the real estate at the sum of $543,629.27.

Had the Bank of California been a national bank, or had the same property belonged to a national bank, its shares would have been bought and sold upon a basis in the consideration of which the higher valuation would have entered and their market value would have been correspondingly affected and such shares would have been accordingly valued and assessed.

We have, we submit, the right to assume and claim that all other real estate enjoyed the same friendly considerations at the hands of the Assessor called to place a value thereon and that all other State commercial banks were favored in the same way; hence we see that in the instance given, there would have been a discrimination between the assessment as made and the assessment of the shares of $368,629.27, being the difference between the actual value of the real estate, $543,629.27, and its assessed value, $175,000. (Record 80-81.)

We do not know and there is nothing in the record to show with certainty the rule of valuation adopted by the appellee in arriving at the value of the solvent credits of the commercial banks; but we assume and have the

right, we submit, to assume that they were valued in much the same way as the real estate.

But, allowing for the moment and for the sake of the argument, the claim of counsel that the habitual violation of the law by the Assessor gives us no claim for relief, still we submit that at the very utmost the Assessor would have been limited in determining a basis for his assessment of the corporate property of the commercial banks of San Francisco to the book value thereof. Had he so proceeded, he would have found in the case of the Bank of California, real estate and personal property of the value of $5,906,403.08, to which he would have added $750,000, as the value of the franchise, making in the aggregate, as the full cash value of the "corporate property" of the Bank of California, the sum of $6,656,403.08. Dividing this amount by the number of shares, it shows the result of $332. 82 per share.

The amount stated is, we submit, the very highest figure at which the Assessor, acting under the solemnity of his oath and impressed with the obligations of his office, could have fixed the corporate property of the Bank of California; and yet we are told in this record that the shares of the Bank holding the property had a value in the market, and hence were bought and sold at the rate of $405 per share, or in the aggregate for the whole 20,000 shares of $8,100,000, or $1,443,597, or eighteen per cent in excess of the value at which the Assessor following the law fixed and was obliged to fix the value of the corporate property. A national bank holding the same property and with its shares at the same price would and could not have been allowed to enjoy any such exemption from

taxation. The sections of the Code 3608 and 3609, which we have quoted at large in the opening brief, would have estopped the Assessor, however much inclined to grant a national bank any such indulgence. And following the course of the assessment to its conclusion the Assessor, had the case been one of a national bank, would have valued the real estate in the way he did and made all deductions; but instead of finding the assessable value of the property to be assessed at $3,061,774, he would have been obliged to fix it at $5,254,871, an increase of one hundred and seventy per cent or thereabouts.

This showing applies with the same force to the cases of all the state commercial banks in San Francisco.

But it will not do, to offer as an escape from the effect of the showing we have made, to say that the Assessor may not have assessed the property of the Bank of California at its true value. The figures outside of the real estate furnish a contradiction to any such reply. The largest and principal item was "money $2,135,224.00." That item could be neither more nor less. As to the real estate, it may be the fact that some of it was situate outside of San Francisco. The other items were taken by the Assessor from the Bank's own statement not made for taxation purposes, and hence are not likely to have been undervalued.

But the learned counsel contends with much earnestness that because the "franchise" could have been assessed for a larger sum, the law is not to be attacked because of the apparent discrimination. The answer to this contention is that in this case it is conceded that the Assessor fixed the full cash value of the franchise of the Bank of

California at the sum of $750,000, or in round numbers at about nine per cent of the value of its shares, and that such was the manner followed in the valuation and assessment of the franchises of all the State commercial banks and trust companies in San Francisco.

The fact that the mode of assessment of bank franchises followed in San Francisco resulted in fixing their assessable value at nine per cent of the market value of the shares is alone sufficient to sustain the present action and justify our claim to the relief demanded.

To reach any sort of equality in the valuation, it would have been necessary for the Assessor to have fixed the value of the franchise of the Bank of California at the enormous sum of $2,943,096.92 or about thirty-five per cent of the value of its shares. He did not do anything of the kind or anything showing a desire to approximate it, and his manifest disregard of the requirements of Section 5219 of the Revised Statutes should entitle the appellant to relief. In this connection it is proper to remark that the tax in cases like the present and where levied on personal property not secured by real estate, collection is made immediately and prior to any opportunity for equalization and in the absence of any provision for payment under protest.

But we go further and submit that the statute itself is void, because no such valuation as that which counsel says the Assessor might have made is either contemplated or authorized. The statute requires that the Assessor shall value the franchise like other property at its full cash value, or at the sum for which it would be taken in payment of a just debt from a solvent debtor (Sec. 3617,

Pol. Code). It is true that the Supreme Court of California, by a bare majority, has held that property, to-wit, a franchise, which could not be sold and which could not be taken in payment of a debt, and of the value of which there is no method of ascertainment, can yet be taxed; still it has not held the Assessor can, arbitrarily and without reason, impose a grossly exaggerated value upon the property of a citizen. He has the plain language of the law for his guide. He must find the full cash value, or that for which the property would be taken in payment of debt and to say that he could value a bank franchise, its mere right to exist, at any sum as two million nine hundred thousand dollars is to say that in California the revenue system not only justifies but demands confiscation.

It has been held in California that a fraudulent assessment may be enjoined and that fraud appears whenever it is shown that the property in question is assessed "at "a valuation greatly in excess of its actual value and "greatly above that placed by the Assessors on similar "property of others."

Pacific Postal Tel. Co. vs. Dalton, 119 Cal. 654.

In a very recent case in the Circuit Court of the Eastern District of Kentucky, it was held:

> "In order to entitle one whose property has been fully valued for taxaton to complain of an undervaluation of other property and to relief in equity by having his own valuation cut down to an equality with that of the property undervalued, it is essential that the undervaluation should have been inten-

tional, and that it should have been systematic or habitual, relating to a large species of property."

Louisville & N. R. Co. vs. Coulter, 131 Fed. Rep. 282.

In that case the complaint was based upon the claim that the tangible property of the State was assessed for the year 1902 at eighty per cent of its value, while the property of the complainant was assessed at its full value and the Court held the showing sufficient to justify its interference.

Louisville Trust Co. vs. Stone, 107 Fed. 305.

There it was said by the Circuit Court of Appeals:

> "It may be conceded that, if the allegations of the bill are made out, there exists in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the state, which necessarily effects an injurious discrimination against the property of which the plaintiff is the owner, and a bill in equity will be to restrain such illegal discrimination, and in such cases federal jurisdiction will arise because of the equal protection of the laws guaranteed by the fourteenth amendment."

In view of these cases it would seem evident that any attempt on the part of the Assessor to place any such valuation as three millions of dollars on the franchise of the Bank of California, in view of the manner in which he is shown to assess real property, would be met with an injunction.

In the consideration of this question as already said it must always be borne in mind that so far as the tax

of which the appellant here complains is concerned, it is made payable in ten days after the assessment is made.

> "And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the Assessor shall collect the same from said bank." (Sec. 3610 Pol. Code.)

The collection of the tax is authorized to be made and was demanded and seizure threatened long before the time appointed for the meeting of the Board of Equalization and prior to the levy of the tax or the fixing of the rate, and in the absence of any right to pay under protest and with nothing but the right to appeal to the Board of Supervisors for relief.

Further we submit that we have the right to say and to ask this Court to hold that the construction which the Assessor puts upon the statute is true and correct and binding upon him in this case. He is a sworn officer of the law and to some extent acts in a judicial capacity.

The Charter of the City and County provides:

> "The Assessor shall assess all taxable property within the City and County at the time and in the manner prescribed by the general laws of the State."
>
> Sec. 2, Art. IV, Chap. V.

Following the line of his duty, observing the requirements of Sections 3617 and 3627 of the Political Code, the Assessor of San Francisco has determined and adjudged that a proper construction and interpretation of the law requires him to value and assess the franchises of State Commercial Banks at about nine per cent of the market value of the shares. We are not called to consider the

act of another incumbent of the office, but here we have the identical assessor, whose judgment we claim is of binding force. It does not lie in his mouth to say that he was in error, or that he could have found in a different way. He has intentionally and in regard to all the commercial banks organized under the State authority, given a final decision as to the interpretation to be put on the tax laws. It may be said that he may change his views and reverse his opinion. Whether he can be allowed to do so in the future is not of moment now, because we are dealing with his conclusion as we find it in this record and by which he is bound. He has agreed that it was and is the fact that he valued and assessed all the franchises of the State banks at or about the rate we have named, and that concession on his part is in effect that such is his deliberate judgment of the true meaning of the tax law under which he acted. It would, we submit, be an unheard-of proposition that a judicial officer could in person and for his own benefit be heard to impugn his own judgment and claim that he knowingly and wilfully misjudged a case.

But if it be held that our contention is not correct as to the law itself, we still claim that in the present case a discrimination in fact appears, such as entitles the appellant to the relief demanded.

The Assessor fixed the full cash value of the shares of the appellant bank at $116 each. His duty was to do that particular thing at the outset. It matters not how he proceeded to arrive at his conclusion. He could have refrained from considering the assets of the bank if he so desired, and that he did consider them is merely evi-

dence of the manner in which he carried on his investigations. If the shares of appellant had possessed a market value, he would have taken that value as the basis of his assessment, but apparently they had no recognized market value, and he for that reason assumed the amount at which he began. There is nothing to be found in the law which authorized or directed the Assessor to take as proof of the full cash value of the shares the amount of capital and undivided profits. Such a selection was purely a voluntary act on his part and after all he must be held to have found the full cash or market value of the shares.

In proceeding to assess the Commercial State banks, he took the tangible assets, and to their value he added a valuation of the franchise fixed at the sum which he deemed it would be taken in payment of a just debt from a solvent debtor. In the case of the Bank of California had he pursued the course indicated by counsel as the law and correct one he would have valued the franchise at the difference between the market value of the shares and the value of the tangible assets, or at a value of $2,943,596.92; but he did not make any such valuation. He found the value of the franchise of the Bank of California to be $750,000, or in the neighborhood of thirty per cent of the value at which he should have fixed it if he had desired to arrive at anything resembling an equality with the valuation of the shares of appellant bank.

Taking the tangible assets and the franchise of the Bank of California together, the aggregate amount is the sum of $6,656,403.08, or eighty-two per cent of the value of the shares.

Hence under any view that may be taken of this case, it appears that the Assessor failed to avoid a very apparent and considerable discrimination as against the shares of appellant which he valued at their full cash value. In other words, he valued one according to provisions of the law, while he favored the other to an extent of nearly one-fifth of its worth.

In the case cited above, Louisville & N. R. R. Co. v. Coulter (supra), it appeared that the property of complainant was assessed at its "full cash value,"—as here in the matter of the shares of appellant,—while other property was assessed at eighty per cent of such value, which is substantially the fact appearing in this record as to the valuation of the corporate property of the local banks. The Court held the discrimination sufficient to avoid the tax and justify an injunction.

Again, this showing is made still more evident and convincing by the valuation of the real estate. In its own statement of its resources, the Bank of California valued its real estate at $543,629.27; but we will suppose that only the bank premises were situated in San Francisco, although nothing appears to show the fact. Then we find that such real estate was valued by the Bank at $250,000, which is to be taken as its market value, but the Assessor fixes the value at $175,000, or at seventy per cent of the market value; and striking an average of the valuation of the real estate and franchise, we find that the property of the Bank of California was assessed at seventy-six per cent of its full cash value; and this was the intentional and systematic course followed by the Assessor in regard to all State banks. In short it was designed and intended

to value their assets at about seventy-five per cent of the cash or market value, and this course of proceeding was systematic and will, if sustained in its first attempt, become habitual.

Counsel furnishes a statement in his brief (p. 47-48) by which he claims that the figures show that the appellant benefited by the assessment in question, while the matter is not material for the reason that we have the Assessor's judgment as to the value of the shares and must abide by that conclusion; yet it may be allowed to call attention to the fact that counsel treats the entire sum of the "loans and discounts" $1,382,338.39 as "solvent credits." Common knowledge teaches us that such assumption is wholly unwarranted, and it must be evident that the Assessor so concluded. Loans and discounts and even solvent credits when made may be considered good, but bankers often find them otherwise.

Referring once more to the Bank of California, it will be observed that it had no surplus of solvent credits, and yet all must know that its capital and surplus fund must have been invested in "loans and discounts," which when valued as "solvent credits" were found to exactly offset the deposits and other indebtedness.

Treating the appellant in the same way, and rejecting the item $130,746.19, its resources, if assessed as a State bank, would have amounted to the sum of $400,915.13, or $80 per share instead of $116, which the Assessor fixed.

Again the counsel in his figuring loses sight of the fact that the first and principal point to be reached is the relative valuation of the two classes of property; or in other words, the basis from which the Assessor should have

started to make the assessment. Had the appellant been a State bank and been assessed in the same way the commercial State banks were assessed and as in their case allowing deposits to offset credits, the valuation of its resources would have been the sum of the United States bonds $50,000, premium $4,800, money $390,915.13, furniture $5,500, franchise $10,000, or in the aggregate $451,215.13, or $90 per share; and hence, if treated as a State bank, the appellant would have started with an advantage over the condition which it was held to as a national bank, in the difference between $116 and $90, or $26 per share. But if it be conceded that appellant's shares were properly valued, that would not save the assessment when it appears that the State banks were undervalued. We quote from

R. R. & T. Cos. v. Board of Equalizers, 85 Fed. 312.

"Much stress has been placed in argument upon the language of the constitution providing 'that all property shall be taxed according to its value.' Defendants say the proper interpretation of these terms requires that property shall be assessed at its full value, and that unless plaintiffs can show that their own property has been in fact assessed at more than its actual value, it is not open to them to complain that all other property in the State is assessed only at a percentage of its actual value. The contention is that if the assessors have obeyed the constitutional direction, and assessed plaintiffs' property at its full value, it is no just or legal cause of complaint, and no ground for relief, that other assessors have put a taxable value on other property much less than its actual value. There are, however, two sufficient answers to this contention: Conceding, for the purpose of testing the soundness of this proposition, that the

constitutional terms 'according to its value' mean the same thing as 'at its full value,' the contention of the state, then, stated with reference to its effect, is this: That it may assess the property of A. at its full value, in obedience to the constitution, and the property of D. at one-half of its value, in violation of the constitution, and, when A. complains that the result has been to violate the constitution in request to the equality provision, the answer is that the objection is not open to A., because he is taxed on no more than the full value of his own property, and that he must pay 50 per cent more on the same actual value than D. Now, it will certainly be admitted that the simple statement of such a proposition suggests its utter untenableness. If decisions may be found which apparently uphold a result such as this, they promulgate a doctrine which cannot be accepted as good law." (p. 315.)

But if it be true that appellant would not have suffered if it had been assessed as a State bank, then it should also be true that the Bank of California and other State commercial banks would not have suffered if assessed as national banks. The rule should work equally both ways.

Had the Bank of California been a national bank, the Assessor would have started with a fixed, well-known and definite sum, $405 per share. He did start with the sum of $5,906,403 assets and $750,000 valuation of the franchise; but instead of valuing the franchises of the State banks at the difference between the value of the tangible assets and the market value of the shares, he placed a much less valuation thereon. For example: The tangible assets of the Bank of California were valued at $5,906,403.08. Its shares had a market value of $8,100,000. In order then to make a valuation of the corporate property of the Bank of California, or of any other com-

mercial State bank, equal to the value of the shares, the Assessor would have been obliged to add to the tangible assets a valuation of the franchise at the difference between $8,100,000 and $5,906,405.08, but as matter of fact he valued the franchise at $750,000 and added that sum to the tangible assets, making in the aggregate $6,656,403, or $332.82 per share; and hence it is shown the shares of the Bank of California are undervalued in the sum of $73 per share, being the difference between $405 and $332; while at the same time, those of appellant are overvalued in the sum of $26 per share.

But let it be supposed that the Bank of California had been, like the appellant, a national bank whose shares had no recognized market value. Then the Assessor would have proceeded to ascertain the value of its shares from its resources other than real estate and franchise, and he would have found that the resources amounted to $5,412,773.81, or $270 per share. From this amount he would have deducted the United States Bonds $1,203,380.95, and Stocks and Bonds California corporations $1,273,118.86, or in the aggregate $2,476,499.81, leaving a balance of $2,936,264. or $196 per share, and it thus follows that the shares of the Bank of California, valued and assessed precisely as those of the appellant, were treated and under the same conditions would have been assessed at 72 per cent of their value, while taking the shares of appellant, we find are assessed at 90 per cent of their value.

Hence we submit that from every standpoint of consideration and from every point of view, the record shows a plain, unmistakable case of discrimination against the

shareholders of the appellant bank, from which it is entitled to seek relief from the Courts.

In Louisville Trust Co. v. Stone (supra) it is said:

> "The value of the complainant's property, as assessed by the board having authority over the property of such corporations, being the defendants in this case, may be said to be the full cash value of the property. The contention upon this branch of the case is that the state board of equalization, in equalizing the other property of the state systematically and uniformly, and particularly in the years 1897 and 1898, assessed and valued other property at only 70 per cent of its fair cash value. If this is true, there is manifest discrimination against the complainant."

In Cummings vs. Bank, 101 U. S. 153, this Court said:

> "When a rule or system of valuation is adopted, by those whose duty it is to make the assessment, which is designed to operate unequally, and to violate a fundamental principle of the constitution, and when the rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

In this connection we again cite

Louisville & N. R. Co. vs. Coulter, (supra).

We recognize the stringency of the rule in cases of this impression; but we submit that this comes squarely within the rule declared by Judge Taft in Taylor vs. N. R. R. Co., 88 Fed. 373, where he said, speaking of the powers of the Chancellor:

> "He can only interfere when it is made clear that there is, with respect to certain species of property,

> systematic, intentional and unlawful undervaluation for taxation by taxing officers which necessarily effect an unjust discrimination against the species of property of which the complainant is an owner."

Here we find that all the State banks were assessed in a way and pursuant to a mode which prevented any equality or the semblance of it, with the valuation and assessment of National Bank shares. Such was the system followed by the Assessor. That it was intentional cannot be denied, and that it was unlawful appears to us established. It was not and could not in the nature of things have been accidental.

Finally, we submit that the Assessor must be held to have known the law and his duty under it, and if, as claimed by counsel, he should have assessed the franchises of the State banks at the difference between the value of their tangible assets and the market value of their shares, then, with full knowledge, he violated a plain and explicit statutory provision and undervalued such property of all the commercial banks to the extent of seventy-five per cent. There does not appear to us any escape from the proposition that appellant was by the assessment in question, put at a great and serious disadvantage.

The counsel for appellee relies with much apparent confidence upon the case of

Bank of Wellington vs. Chapman, 73 U. S. 211.

The case is so radically different in its facts that we wholly fail to see in what respect it can be pertinent in this discussion. There, National and State bank shares were both taxed and valued and assessed in the same

manner; and referring to the Ohio statute and plainly with a view that its decision might not be misunderstood, this Court said:

> "With no purpose to discriminate against the holders of shares in National banks, and with the taxation of the shareholders in the two classes of banks, State and National *precisely* the same, the question is whether this system of taxation in Ohio in its practical operation, does materially discriminate against the National Bank shareholder in the assessment upon his bank shares." (pp. 214-215.)

In Ohio, the Assessor ascertained the value of the shares of both State and National Banks from statements of the resources and liabilities. In California, the Assessor ascertains the market value of the shares of the National bank and determines the value of the resources and the extent of the liabilities of a State bank. The two modes are radically and essentially different and must reach different results.

Finally in conclusion of this branch of the case we submit that the record exhibits the ultimate condition of fact to be that the Assessor, following the statute of California, as he interpreted its commands, has valued the shares of the appellant bank at their full cash value and has valued the corporate property of State Commercial Banks in such way that indirectly the shares are valued at eighty-two per cent of their value.

In Ohio, in the year 1885, proceeding under the statute approved in Bank of Wellington vs. Chapman (supra), bank shares, both State and National, were assessed at sixty-five per cent of their value, while other property was assessed at sixty per cent of its value. This Court held:

> "As regards the allegation of a discrimination against the stockholders on account of the shares held by them, caused by the increase in the assessment of five per centum made by the State Board of Equalization, the matter is not altogether free from difficulty; but we are of opinion that there is such a discrimination as is forbidden by Section 5219 of the Revised Statutes of the United States."
>
> Whitbeck vs. Mercantile Bank, 127 U. S. 193, 195.

If the rule declared in the above case is to be accepted and that it will be we cannot doubt, then we submit that our case is established.

Finally, we desire to again recall the attention of the Court that under the Constitutional provisions in California, a resident national bank shareholder could not be allowed to deduct his debts from the value of his shares, because a share of stock is not a credit; but if a resident were allowed that privilege, a non-resident having debts outside of the State and taxed upon his shares in the State, could certainly have no such privilege, and for that reason and because of that fact, a holder of shares in a State bank would enjoy an advantage.

In Miller vs. Heilbron (supra), the Supreme Court of California said:

> "In making his assessment of plaintiff's shares in the National Bank the Assessor was obliged to pursue the mode prescribed in Section 3640 of the Political Code, and could not deduct from their valuation debts due from here to citizens of the State.
>
> 'Credits' are declared to be property by the State Constitution. They are property in which other 'moneyed capital' is invested than such as is invested in National Bank shares. Yet, as we have seen, the State law, enacted as permitted by Section 1 of

Article XIII of the Constitution, requires the Assessor, in assessing credits, to deduct therefrom all debts due by the party assessed to *bona fide* residents of the State.

"Here is clearly a discrimination against the owner of National Bank shares and in favor of the owner of credits. The former is assessed at a greater rate than is the latter." (p. 138.)

The answer of the counsel, for appellee to the last proposition stated in the opening brief, is in effect that our contention is incorrect, because it would lead to the conviction of the Legislature of California of the commission of an absurdity. The answer would be sufficient if it could be admitted that legislatures are never guilty of enacting absurd laws, but such an admission would surely contravene the facts of history.

Again it is claimed that where two interpretations can be made, that consonant with the evident purpose will be adopted; but the converse of that proposition is true, that where there is but one interpretation to be given, then it must be taken, although the Statute may on that account be defeated of its purpose. The Supreme Court of California said in the case cited by counsel:

> "Where the language of a statute is clear and leaves no doubt as to the legislative intent there is no room for interpretation and judicial discretion cannot break its force, however disastrous the consequences may be." In re Mitchell, 120 Cal. 386.

Here we claim there is no room for construction or interpretation. In Section 3608, it is said that all of the personal assets of a National Bank are exempt from

taxation. The Court had so held in several cases in California.

> First National Bank v. San Francisco, 129 Cal. 98.
> People vs. National Bank, 123 Cal. 53.
> San Francisco vs. National Bank, 92 Fed. 273.

And in Section 3604 it is enacted that the value of all the exempt property shall be deducted from the valuation of the shares. The exact language is as follows:

> "In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate *and property exempt by law from taxation* bears to the whole value of all the shares of capital stock in said National bank."

The meaning is clear and it is manifest that the Legislature enacted that from the value of the shares should be deducted the value of the real estate and property exempt by law from taxation, leaving the result as the assessable value of the shares. It will not be allowed, we submit, to say that the "law" mentioned in the section referred only to the Statutes of California, because Section 5219 of the Revised Statutes was as much the law in California as any of its own enactments. Besides, in its Constitution, the State of California has declared the property in question non-taxable.

Section 1, Article XII says: "All property in this "State, not exempt under the laws of the United States, "shall be taxed in proportion to its value." Hence, under the organic law of California, the property was exempt.

It may be conceded that it was a legislative oversight

or mistake, but it is the rule in California that tax laws are to receive a strict construction.

> "All proceedings in the nature of assessing property for purposes of taxation and in levying and collecting taxes thereon are *in invitum* and must be *stricti juris.*"
>
> Weyse v. Crawford, 85 Cal. 196.

Hence, the Court is to follow the language as it is found set forth in the Statute. To do otherwise will, we submit, result in the making by this Court of a law for California which its Legislature may or may not have intended.

However, it is to be said that it is not clear that the Legislature intended to confine the exemptions to those granted by the State of California. The Legislature, it may be admitted, was trying to provide a system by which National Bank shares should be valued at their full value, and State Bank shares should be exempt and only bear the indirect burden of the taxation imposed on the corporate property; but at the same time it was aware and well knew that it must avoid a discrimination. The cases of McHenry vs. Downer, San Francisco vs. C. W. Bank, and People vs. D. O. Mills Nat. Bank had been decided and the law was well understood. Being thus fully advised, it is more than probable that the Legislature concluded that it would tax National Bank shares at their full market value and from that market value deduct the value of the entire corporate property, and thereby and out of that process an assessable value would be reached somewhat equivalent to the percentage of the

assessable valuation of the shares of stock in the State banks.

For example, we will suppose that the Assessor had first ascertained the book value of the shares of appellant to be the sum of its resources divided by the number of shares; he would have found $368 as such value, but at the same time had ascertained that the same shares had a market value of $484, or an excess of 32 per cent as was the case in reference to the shares of the Bank of California, then by following the letter of the law he would have proceeded to deduct the book value of the assets from the market value of the shares, leaving $116 the assessable value and he would have taxed the shares of appellant bank at about the percentage at which the shares of the Bank of California were indirectly burdened, that is to say, at about thirty per cent of the market value.

To state it otherwise, the shares of the Bank of California were indirectly assessed in gross at the sum of $3,061,774, or about $150 per share; they had a market value of $405. Hence they were assessed at thirty-six per cent of their market value. Had the same course been followed in the case of appellant bank with its shares at a market value of $484, its shares would have been assessed, after deducting the value of all the corporate property from the market value of the shares at $116 per share, or about twenty-six per cent of their market value.

We use this illustration to show that it must have been in the mind of the Legislature that Bank shares usually have a market value considerably in excess of the value of their resources.

We know from the record that in the case of the Bank of California, the value of its shares exceeded the value of its resources by the difference between $332 and $405, or $73 per share; and we may be allowed to say, although not appearing in the record, that the fact exists in regard to all Banks in San Francisco which have been established for any length of time. Although in the case at bar it appears that the market value of Appellant's shares did not exceed the value of its resources, and hence under our reading of the law and according to its letter, there was nothing to assess, still that fact cannot militate against the proposition that for the purposes indicated and in order to provide for the taxation of National Bank shares (while not taxing State Bank shares) in such a way as to avoid the objection of a discrimination, it may well have been the intent of the Legislature to provide for the deduction of all the personal assets of the National Banks. This is certainly a reasonable construction and it has the merit of being one which would tend to make out a just, equable, and fair taxation of the two classes of property and avoid the palpable discrimination which now prevails; and finally it would save the Assessor from adjudging the absurdity that a bare franchise of a Bank —the mere right to exist—has a full cash value and would be taken in payment of a just debt from a solvent debtor at such a sum as $2,943,096.92, or twenty-five per cent of the market value of its stock, and at which sum counsel contends the Assessor should have valued the franchise of the Bank of California.

While we do not in any way, or in any degree, waive our contention that the law in question must be held de-

fective because of its total failure to tax bank shares, yet do commend the construction we have now urged as being reasonable and in all probability that which the law makers intended it should have.

It is respectfully submitted that the judgment should be reversed.

WILLIAM S. WOOD,
Counsel for Appellant.

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## NOTE.

Since the foregoing brief was in print, we have found from an examination of the Annual Report of the Bank Commissioners of California for the year 1900, that in that year the Bank of California had real estate in San Francisco other than the Bank premises of the value, as fixed by itself, of $130,641.41. This sum, added to the value of the Bank premises, gives $380,641.41 as the value of the real estate of that Bank in San Francisco according to its own estimate, all of which was assessed at a valuation of $175,000, or forty-six per cent of the value.

At page 40 we credited the Assessor with having assessed the real estate of the Bank of California and other Commercial Banks at 70 per cent of the real value, and we now suggest that the true percentage was, and should be stated, at fifty per cent. This fact will of course have its effect upon all the other calculations and reduce the percentage of valuation on the property of the commercial banks to less than eighty per cent of the actual or full cash value.

IN THE

# Supreme Court of the United States.

October Term 1904.

No. 44.

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THE SAN FRANCISCO NATIONAL BANK,

*Appellant,*

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO,

*Appellee.*

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## Further Argument for Appellant.

The briefs heretofore presented to the Court on behalf of appellant sufficiently bring to the attention of the Court the several points upon which reliance is placed; yet, and for the purpose of aiding the Court in its examination of the case, a brief elaboration of some of the arguments made is respectfully submitted.

### I.

BANK OF CALIFORNIA vs. SAN FRANCISCO, 142 CAL. 276.

This case is cited by counsel for appellee and it is argued in the brief that it is there held and the law of California interpreted to provide, that the full market

value of the stock of a banking corporation is assessed by an assessment of its corporate property, including the franchise; and that it is also held that the system in California contemplates the deduction from the entire market value of the shares of the taxable value of its corporate property and the valuation and assessment of the *franchise* at the balance; or in other words, at the sum of the difference between the market value of the shares and the taxable value of the corporate property.

The counsel does not furnish any statement of the way in which this Court is to ascertain exactly the interpretation placed by the State Court upon the Statute, and it is quite important in this discussion that the proposition should be stated before the case in question can be considered.

We take it that it will be accepted that this Court will consider itself bound only by the result of a case in the State Court and will not consider itself obliged to take without question all that the State Court may have said in search of a ground upon which to base its judgment. That this must be correct appears incontestable, otherwise this Court would find itself in inextricable confusion when it undertook to reconcile the result of cases with the reasons given.

In *Hart* vs. *Burnett*, 15 Cal. 530, 599, one of the great leading cases of California, it is said:

> "A decision is not even authority except upon the point actually passed upon by the Court and directly involved in the case. But even then the mere reasoning of the Court is not authority. The point decided by the Court and which the reasoning illustrates and

explains, constitutes a judicial precedent. The books are full of cases in which learned judges have earnestly deprecated the attempt to urge the mere dicta or the arguments of judges as authoritative expositions of the law."

Cohens vs. Virginia, 6 Wheaton, 399.

Taking the foregoing as the true statement of the rule, it is only necessary to inquire as to the points involved in Bank vs. San Francisco in order to determine the extent of the influence which that case will have in the determination of the one at bar.

For the year 1900 the Assessor valued and assessed the franchise of the Bank of California at the sum of $750,000. The tax thereon was paid and suit brought to recover the payment. Two points were raised:

1. That the franchise was not taxable;
2. That it was overvalued.

The Court held against the bank upon both propositions. In the first place, it held that the franchise of a bank was property within the meaning of the word as used in Section One of Art. XIII of the Constitution. In the second place, it held that the Assessor had the power to fix a valuation on the property assessed and that the remedy of the bank, in cases of excessive valuation, was an application to the Board of Equalization of which it had been afforded an opportunity.

It may be remarked that upon the first point, the Court reversed itself and in the majority opinion ignored the leading authority presented by counsel for the Bank and in which the Court had taken a position precisely opposite to that assumed in the Bank case.

SAN FRANCISCO v. ANDERSON, 103 CAL. 69.

And upon the second point the Court, while admitting that the franchise was not vendible, nevertheless held in effect, but without mention, comment or explanation, that a valuation of such property could be fixed at a sum for which it would be taken in payment of a just debt from a solvent debtor as required by the provisions of the revenue system. In his dissenting opinion, Chief Justice Beatty says that the decision as rendered by the majority of the Court overrules San Francisco vs. Anderson (supra) and holds unconstitutional the Code definition of value set forth in Section 3617, Sub. 5, Political Code; but as no mention of either the former case or of the Code provision is made in the majority opinion it is to be taken that they would not have gone to the extreme mentioned by the Chief Justice, had they deemed it necessary for the decision of the case in hand, to consider either of them.

However, and whatever may be said either in support or criticism of the case, it stands for exactly what it is worth and what its conclusion covers, namely: that a franchise may be taxed and that the Assessor is authorized to put a value upon it, which value, except upon a showing of fraud, cannot be attacked.

In this statement is comprised everything we submit for which the decision can be used, or for which it will be accepted in this tribunal.

At the trial of the Bank case, the parties were not confined, as they might have been, to the real issue, but were allowed to go at large into the question as to the method pursued by the Assessor in reaching his judgment that

the sum of $750,000 was a lawful valuation of the franchise, and it was ascertained that he did consider the market value of the shares and assessed the franchise at about twenty-five per cent of that value.

The Court had already quoted from a former case:

> "The duty of arriving at the valuation was cast upon the Assessor. The method of arriving at the valuation, the process by which his mind reached the conclusion (in case where as here, it is not pretended that he acted fraudulently or dishonestly) is a matter committed to his determination. * * * If he erred in his judgment the remedy was by application to the Board of Equalization, and the Courts will not revise their judgment of these officers upon such questions."

And thereupon and following the foregoing quotation, the Court said:

> "This appears to be determinative of the contention here made." (p. 288.)

Notwithstanding this clear and explicit ruling, the Court then proceeds to devote a considerable portion of its opinion to a consideration of the question as to whether or not the Assessor should, in arriving at his judgment, consider the value of the shares; and it is to the use of such part of the opinion that we now object, and we place our objection upon three grounds:

1. That the reasoning of the opinion cannot be used;

2. That the reasoning of the opinion was not necessary to the conclusion;

3. That the Court had already held that it could not and would not revise the judgment of the Assessor, except in cases of fraud or dishonesty.

It will certainly be conceded that if the Court will revise the judgment of the Assessor as to valuation for the purpose and with the object of giving it support, it would not refuse to do the same thing to protect an overtaxed citizen for the purpose of awarding justice.

The Court does not say that the value of the shares shall be considered by the Assessor in arriving at his judgment, nor does it say that all things entering into and making the value of the shares shall be taxed. It does say:

> "It is clear that *if* the laws of the State *properly* express the intention that everything that gives value to the shares of the corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property." (p. 289.)

It will be seen that the matter is left open and inasmuch as the Court fails to either state the laws or furnish its construction of them, it contented itself with leaving the question for future consideration. But it will be said that the Court in the use of the foregoing language, was referring to a former decision:

WATER WORKS v. SCHOTTLER, 62 CAL. 69, 117.

This case was a writ of review and arose out of the fact that the Board of Equalization of the City and County of San Francisco had raised the valuation of the property of the Spring Valley Water Works, the corporation engaged in supplying water to San Francisco, by adding thereto an assessment of certain property described as "franchise or franchises" at the sum of Five million

dollars. The case came before the Court upon a petition to review the action of the Board and brought before the Court all the proceedings at the several hearings.

It appeared that the Board of Equalization assessed the franchise of the Water Works by taking the aggregate of the market value of the shares of stock in the Company on the seventh of March, 1881, and deducting therefrom the value of the real and personal property of the Company and held the difference to be the value of the "franchise or franchises." The Court held that the Board possessed the same powers as the Assessor and its valuation imported the same verity and was entitled to the same consideration.

It also appeared that the Company held and enjoyed franchises other than its right of existence, such as the right of eminent domain, the privilege of supplying water to the City and its inhabitants, the privilege of using the streets, alleys and ways of the City for laying down its mains, and the privilege of collecting water rates.

The only point actually before the Court and determined concerned the jurisdiction of the Board of Equalization in its action.

Section 1074, Code of Civil Procedure provides concerning the Writ of Review as follows:

> "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer."

And the Court at the end of its opinion said:

> "Our conclusion is that the Board of Supervisors in its capacity of a Board of Equalization had juris-

diction of the person and subject matter in the matters involved in this cause, and the judgment of the Court below is affirmed." (p. 119.)

The foregoing is the conclusion of the Court and is the only matter for which the case is authority, binding upon this Court under the rule declared in Hart vs. Burnett (supra).

It is true that the arguments of counsel took a wide range, and many propositions were presented which had no relevancy to the precise question involved and which was finally decided. And it is also true that the learned Judge who wrote the opinion considered the propositions of counsel and stated his views thereon at length; but after all the case was finally narrowed down to the point at issue.

In the course of argument by counsel, various objections to the raise in the assessment were made, but with only two of such objections is the present case concerned:

It was contended in the first place, that the petitioner owned no taxable "franchise or franchises"; and in the second place that the "franchise or franchises" which it did own, if taxable, had been overvalued. The Court held against petitioner, as to both objections. As to the first, because the constitution expressly provided for the taxation of franchises; and as to the second, because the Board had, in the exercise of its undoubted power, made the valuation in question (p. 112).

In the opinion will be found a very brief expression of the learned Judge to the effect that everything entering into and giving value to the shares should be taxed; but

we submit that this declaration, though not necessary to the determination of the case and to be treated as dictum, can only be taken to mean that in the judgment of the Court the various rights and privileges of the petitioner, other than its corporate franchise, were objects of taxation. That this interpretation is reasonable and should be accepted, is supported by two reasons.

In the first place, we all know and recognize that "everything entering into and giving value to the shares" never was and never can be taxed without a direct taxation of the shares themselves.

In this and other briefs in the case many things are pointed out which enter into and tend to increase the value of the shares, but which, owing to their nature and character, cannot be valued or taxed.

In the second place, because the Court did, immediately following the use of the expression just noticed, eliminate and declare not taxable, a very important element and one tending largely to increase the value of the shares, and stated its opinion in these words:

> "It is contended that good-will enters into and forms an element in the value of the shares of stock. No case has been produced to us, nor have we been able to find any holding or even intimating that this is so. We find no such element of value in the least hinted at, by any one who has written on the subject, nor has any such been called to our attention. We cannot recognize any such element as giving value to shares in a trading corporation. It would be strange to predicate good-will as pertaining to or extending to an abstraction, to an "artificial being, invisible, intangible, and existing only in contemplation of law." (p. 118.)

Now it must follow that if by the tax laws of California as interpreted by its Court and which interpretation this Court is called to accept without question and without murmur, the good-will of the business of a corporation which by the laws of California is declared to be vendible property (Civil Code, Sec. 993) does not enter into and cannot be considered as an element in the valuation of its shares, then the laws of California do not properly or otherwise express the intention that everything which gives value to the shares shall be assessed.

We all know and freely recognize that good-will is an element in creating a value to the shares. This Court has so held, but under the tax laws of California it is excluded, and hence the Assessor in forming his judgment of the value of the corporate property is obliged, in obedience to the law as interpreted by the Supreme Court, to exclude wholly from consideration the important element of good-will.

This consideration, we submit, taken by itself and without anything further, is alone entirely sufficient to refute the claim of appellee that in California the law requires the taxation of everything making the value of the shares.

But we all know and recognize that other things than good will, and which like it cannot be taxed in California, enter into and are elements in making the market value of shares.

As said by this Court, the value of shares is predicated upon the fact that the corporation "so uses the tangible property which it possesses, so transacts business therein." Again, the skill and efficiency with which the business may be conducted, the character of its enter-

prises, the ability and energy displayed in the management of its affairs, the length of time it has been engaged, the reputation which it has, the credit which it enjoys, its standing, its known solvency and probity, its good name, and finally—and not by any means the least important—the names of the men who control the affairs.

Horace Greeley made the New York Tribune. His name entered largely into and gave to the shares of the Tribune Company a value far in excess of its types, presses and other materials employed in the publication of the paper, and yet it would hardly be said by the most persistent of tax gatherers that the name of Horace Greeley, however much it may have entered into and given value to the shares of the Tribune Company, was a taxable asset.

It must be allowed that the name of John D. Rockefeller as a Director of a Bank, would give its shares a value which the names of men of little or no note in the financial world, would not afford. In the one case, everybody would want the shares, and in the other, though of equal merit, they might seek in vain a market.

It is current news that in England it is a common practice to pay titled men large sums of money to induce them to become the nominal heads of companies whose shares are designed for the general public. These payments are made because the name of a member of the Aristocracy will give a value and standing to shares in the estimation of the public which the name of a commoner would not supply.

Now all will admit that such elements enter into and tend to make the value of the shares, and yet nobody

would, we believe, have the hardihood to claim them as taxable property.

When the case to which the Court referred (Water Works vs. Schottler) is examined, it is readily seen why in the Bank case the Court did not feel itself prepared to hold in terms that the true value of the shares is an element in determining the value of the property for taxation under the California system, and why it preferred to leave the matter undecided and held, as we have shown that *if* the laws *properly* express the intention that everything that gives value to the shares shall be assessed—then the value of the shares become an element for consideration. This language, it is submitted, does not hold the Court to anything and leaves it on a future occasion at full liberty to reconsider the point. It is plain that one of two things occurs: either the Court was unwilling to determine so important a question on the authority of a single unsupported expression found in a former opinion, and that a mere obiter dictum, or it was disinclined to accept as law that expression.

Finally, it is submitted that the Supreme Court of California designed, by its guarded language, to avoid any expression of opinion beyond the mere requirements of the case in hand. This is also apparent from the fact that no attention is given to the statute itself. It is not even cited, yet we know that the Constitution provides that property shall be taxed "in proportion to its value to be ascertained as provided by law." It has been held in California that the section is not self-executing, but merely fixes the liability of property to taxation and the standard upon which it is based, but confides the duty of

prescribing the machinery by which to ascertain the value to the Legislature.

McHenry v. Downer, 116 Cal. 20.

The Legislature, in pursuit of its power, prescribed the machinery by which to ascertain the value, and that action certainly and without possible question, forms the guide for the Assessor. When we look into the action of the Legislature, we find that it is enacted that the corporate property shall be assessed at its full cash value and that such value shall be the sum at which the corporate property would be taken in payment of a just debt from a solvent debtor. Nothing can be found in the law which authorizes, much less directs, the Assessor to consider the value of the shares in his determination. Taking the shares as the measure of the value of the corporate property is wholly foreign to the statute.

The Court, when writing the opinion in Bank of California vs. S. F. well knew the existence of the law, and it is not possible to consider them ignorant of it; and the failure to mention it in the opinion, taken with the indefinite language of the opinion, tends strongly to the conclusion that it was only intended to sustain the action of the Assessor in the case before them. In no other way can the sarcasm of Chief Justice Beatty in his dissenting opinion, wherein he intimates that the majority has declared the tax law unconstitutional, be regarded as undeserved. At the very utmost, all that can be claimed is that the franchise might be valued at the difference between the value of the shares and the corporate property, provided the Assessor could so adjudge honestly and

without fraud; and provided it could be said, in the language of the Supreme Court that the assessment was not "at a valuation greatly in excess of its actual value and greatly above that placed by the assessors on similar property of others."

Tel. Co. vs. Dalton, 119 Cal. 654.

In other words, there is and must be a limit to the powers of the Assessor. Anything else would simply be intolerable. He is to be governed by the statute which, under the authority of the Constitution, was enacted for the purpose of determining his action. He could not proceed and would be without power in the absence of the statute, but taking the claim of counsel in the broad sense in which it is put forth we find him asserting that the statute directs that the Assessor shall value the franchise of the Bank of California at nearly three million dollars. Imagine, if it be possible, such a valuation. The Bank was organized in June, 1864. Its term of existence is fifty years. It has less than ten years of life. Now suppose that a depositor in the Bank, having money to his credit to the amount of three million dollars, should, on demand therefor, be offered the franchise. Is it possible to conceive that any man in his senses would accept the franchise at any such valuation, or consider it full payment of a just debt for the sum named by a solvent debtor? And yet, the Assessor, acting honestly and without fraud and obliged not to place a valuation on the franchise "greatly in excess of its actual value", must, according to counsel for appellee, in order to escape the overthrow of the statute here in question, say on his oath that the franchise

of the Bank of California should be taken in payment of a just debt from a solvent debtor at the enormous sum of Three million Dollars, or, to express it exactly, $2,943,096.92.

The same claim is made as to and applies to the assessments of the franchise of all other Commercial State banks, and the same reasoning as to its correction is applicable.

In conclusion it is submitted that the case of Bank of California v. San Francisco (supra) fails to support its contention of appellee.

But before leaving the case, it may be said that having the present controversy in mind, the Supreme Court well said:

> "In this connection, it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the state is at liberty to adopt,—in fact bound to adopt—unless such shares are otherwise covered by the assessment of the property of the corporation." (p. 289.)

And if, as here shown, the shares are not and cannot be covered by the assessment of the franchise, then it must be agreed that the Court is correct in its dictum that the State is bound to assess the shares.

In the brief of appellee, other cases are cited from California for the supposed purpose of supporting the point first stated.

SAN JOSE GAS COMPANY v. JANUARY, 57 CAL. 614.

There the Court, in a short opinion, said that the fran-

chise of a corporation, in which was included the right to use the streets and alleys, to supply light, and to collect rates, was taxable and that the judgment of the Assessor as to its value, when not attacked for fraud, would not be revised by the Court. Nothing can be found in the opinion material to this investigation.

SAN FRANCISCO v. ANDERSON, 103 CAL. 70, 71.

In this case the question was whether or not a "seat in the San Francisco Stock and Exchange Board" is taxable property. The Court held that it was not. The Court said:

> "It is a mere right to belong to a certain association with the latter's consent and to enjoy certain personal privileges and advantages which flow from membership of such association."

In the view of Chief Justice Beatty, as declared in his dissenting opinion in Bank of California v. San Francisco (supra), this holding applies to the franchise of a Banking corporation, which the Chief Justice says is not transferable or vendible any more than a broker's seat in the Stock and Exchange Board. In this statement he is in harmony with the majority of the Court in whose opinion it is held that the "franchise of being and existing" is incapable of assignment and survives "in the mere fact of corporate existence" after all property capable of assignment has been transferred to others by the corporation. (142 Cal. p. 281.)

It may also be said that the corporate franchise resembles a seat in a Stock Board, in another essential particular: The seat in the Board, as said by the Court, is held

subject to the consent of the Association from which the right to hold it emanates; and likewise, a franchise is held subject to the consent of the State under whose authority it is obtained.

Section 1, Art. XII of the Constitution of California reads:

> "Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

The citation of the Anderson case by appellee affords the opportunity of exhibiting to the Court the several positions which the Supreme Court of California has assumed in its consideration of the question of taxing franchises and intangible property of like character.

GERMANIA TRUST CO. v. SAN FRANCISCO, 128 CAL. 595.

A reading of this case fails to show any pertinency in the present discussion.

PEOPLE v. NATIONAL BANK, 123 CAL. 53-60.

In this case nothing was decided except that the personal assets of a National Bank, such as "safes and fixtures" and "money" were not taxable.

SAN FRANCISCO v. FRY, 63 CAL. 470.

In this case it was held that under the provisions of Section 3640, shares of stock could be taxed where the property of the corporation was situate in another State and the taxes there were paid by the corporation. If any-

thing of moment can be gathered from this case, it is that shares of stock do not always and for all purposes represent the assets of the corporation, as claimed by counsel for appellee.

In conclusion, it is submitted that in no case has it been held as a conclusion, or said as a dictum, that the system in California contemplates the deduction from the market value of the shares of the taxable value of the corporate property and the valuation and assessment of the franchise at the balance or remainder.

## II.

Again and upon another proposition, the Court is now asked to consider further the matter of the deduction of credits from debts, and the defects of the statute in that regard.

The statute in question, and which has been inserted at large in the opening brief, deals wholly with the shareholders of the National Banks, and it undertakes to tax them upon a valuation of their shares. In no way does it attempt to deal with the banks in regard to their personal assets. There is no provision requiring the banks to make statements or to exhibit to the Assessor the value of their resources, or the extent of their liabilities, and no way is pointed out, directly or indirectly, for the ascertainment of these essential facts. The Assessor is without power or authority to require a statement from the banks, and it may also be said that he cannot require any such showing from the shareholders.

Section 3629 of the Political Code treats of the statement and provides that the Assessor must exact from

each person a statement under oath, setting forth specifically all the real and personal property owned by such person or in his possession or under his control at twelve o'clock M. on the first Monday in March."

In regard to solvent credits, the Section provides that the statement shall show: "All solvent credits, unsecured by deed of trust, mortgage or other lien, on real or personal property owing to such person * * * deducting from the sum total of such credits such debts only unsecured by trust deed, mortgage or other lien on real or personal property as may be owing by such person, * * * to bona fide residents of this State."

The provisions of the Code merely provide that the tax payer shall exhibit in his statement his own peculiar solvent credits and from them he is allowed to deduct his own peculiar debts due to bona fide residents of the State. It is nowhere provided that in the statement there shall be included any reference to the credits and liabilities of any bank of which the maker of the statement may be a shareholder. No such thing is contemplated by the statute. It is no part of the machinery provided by the Legislature for the ascertainment of the assessable value of the shares. Hence, the statement of a National bank shareholder, setting forth the solvent credits and debts of the bank, would of necessity be rejected by the Assessor for the reason that he is nowhere authorized to demand or accept it. Section one of Article XIII provides that value for purposes of assessment shall be ascertained "as provided by law." It being held as already said that the clause is not self-executing there must of necessity be

a law providing the mode before the value can be ascertained or an assessment made.

The shareholder is certainly not required to furnish any such statement, and it follows that nothing has as yet been done in California whereby the Assessor can obtain the information in the case of National Bank shareholders, with which he is furnished in the assessment of the property of other persons.

When the language of the statute is considered, the importance of the foregoing suggestions become apparent.

In Section 3609, it is provided in effect, in the first place, that the shares of a National Bank shall be valued and assessed as other property and shall be included in the valuation of the personal property of such stockholders * * * but in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provision of paragraph 6 of Section 3629 of the Political Code of the State of California."

In the second place it is provided that each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits in the same manner as such deductions are allowed by the provisions of paragraph 6 of Section 3629 of the Political Code.

And in the third place it is provided that there shall be deducted from the value of the shares of each stockholder, such sum as is in the same proportion to such value as the total value of the real estate and property exempt

from taxation bears to the whole value of all the shares of capital stock of said National Bank; or in other words, from the gross value of the shares, shall be deducted the real estate and other property.

Looking at these three branches of the section, we see that the mode of valuation is fixed; that the stockholder is declared entitled to deduct from the value of his shares his debts due bona fide residents of the State; and that from the gross value of the shares is to be deducted the value of the real estate and property *of the bank* exempt *by law* from taxation.

As to the second proposition, it need only be said that the Legislature is wholly without power to provide for the deductions of debts from the value of National Bank shares.

In McHenry v. Downer, 116 Cal. 20, 27, the Court said:

> "As National bank shares are property and not *credits*, the Assessor is not authorized to deduct from the value thereof debts due by the owner to others."

The italic is that of the Court.

Hence, it must follow that the provision is a nullity and affords the shareholders no benefit whatever.

As to the third proposition, the same objection arises. The provision in effect says that from the whole value of the shares there shall be deducted the value of the real estate of the bank and of all property of the bank exempt by *law* from taxation. Now, while it may be true that the Bank would, if organized under the State, be allowed to make the deductions provided in the section, it must be clear that the right does not appertain to a National bank

shareholder. There does not appear to be any reason to support the contention that the National Bank shareholders can be legally permitted to deduct from the value of the shares the debts of the Bank. It is no answer to say that the statute so provides, when it is apparent at a glance that the statute is in derogation of Section 1 of Art. XIII of the Constitution of California, wherein it is provided that the Legislature may permit debts to be deducted from *credits* not from other property. Nor will it do to say that the appellee, as Assessor of the City and County of San Francisco has followed the statute as it reads and allowed the deductions. His action, if unauthorized, can form no precedent nor supply a defect in the law.

In short, it is submitted that the taxpayer is entitled to have a legal right founded upon the Constitution, because of which right he is entitled to demand the deductions in question; and it appearing that the Legislature has not provided any such legal right, the statute must be held justly subject to the objection that a National Bank shareholder cannot enjoy the benefits of the deductions in question, while they are granted legally and without question for the advantage of the shareholders in the State Banks.

Further, it appears in this record and from the tabulated statement that there were in the year 1900, and at the time the assessment was made, outstanding solvent credits in San Francisco owned by State Commercial Banks amounting to the sum of $18,501,592, and in other parts of the State of California, State Commercial Banks owned credits amounting to the sum of $21,508,595, all

of which were moneyed capital in the hands of individual citizens of the State of California, and entered into direct competition with the National Banks and from the value of which the State banks were permitted to deduct unsecured debts, but the shareholders of National banks could not under the provisions of the Constitution of California, be allowed the same privilege, directly or indirectly.

Again, it may be said that the statute itself does not contain any authorization justifying the Assessor in allowing the deduction of debts of the Bank from the value of the shares. It is not said in providing for the deductions, that shares shall be treated as solvent credits. In the case of the deductions by the shareholder of his own debts, it was carefully enacted that the mode provided in Subdivision Six of Section 3629, should be followed; but when it came to providing for the deduction of the property of the Bank, no such reference to the other section was made, and it can only be gathered from a strained construction that it was even intended to enact that shares should be treated as credits.

It may also be said in this connection that the case of Bank of Wellington v. Chapman, 173 U. S. 205, does not militate against the position of appellant. There the Court said:

> "Under the Sections of the Revised Statutes which relate to the taxation of these latter cases of banks (Section 2762, etc.) the shares are to be listed by the Auditor at *their true value in money,* which necessarily demands the deduction of the debts of the bank because the true value of the shares in money is necessarily reduced by an amount corresponding to the amount of such debts."

That this rule cannot obtain in California is clear; and that, by its Statutes, as interpreted by its Court, an entirely different rule is established is apparent from a most cursory reading. The Assessor in California is not required to find the *true value in money* of the shares of a National Bank. He is to determine their "*full cash value.*" Hence the Assessor in California would have nothing to do with the value of the corporate assets, and would not deduct anything where he sought to ascertain full cash on market value. It will be conceded that full cash or market value is not ascertained by deducting the debts of the bank nor is any such deduction demanded in the ascertainment of such value.

III.

Finally and in support of the proposition urged at the close of the reply brief of appellant to the effect that it is a reasonable construction of the Act in question to hold that the Legislature really and in fact intended what it said, namely, that from the gross market value of the shares should be deducted the value of all the corporate property leaving the difference between the two values to be assessed and taxed,—it is submitted that the proposition thus advanced is almost susceptible of demonstration.

For the sole purpose of such showing, the Report of the Bank Commissioners of California for the year 1900 and certain well known facts will be used. It is assumed that counsel for appellee, being thoroughly conversant with the Report and with the facts which are used, will not interpose any objection, provided they are confined

to the purpose suggested, that is, of showing the probable intent of the Legislature.

In the following statement the Banks considered are:

1. The Nevada National Bank;
2. The First National Bank;
3. The Crocker-Woolworth National Bank;
4. The San Francisco National Bank;
5. The Bank of California.

The purpose is to exhibit to the Court the results which would follow were the construction of the Statute adopted which is suggested in the closing part of the Reply Brief, and to compare such results with the assessment of the Bank of California.

It is to be remarked that the shares of the Nevada and First National were bought and sold on the Stock and Bond Exchange, while those of the Crocker-Woolworth and the San Francisco National were not so bought and sold, and to arrive at the market value of the shares of the two last named banks, forty per cent is added to the book value, that being the percentage of difference between the book value and the market value of the shares of the First National. The value of the shares of the Bank of California is taken from the record in this case, and it must also be said that in making the calculation in the case of the Bank of California, the franchise is not considered for the reason that prior to the time the statute in question was enacted and up to the time it became a law, no such thing as the assessment of a bank franchise had ever been attempted, and it is reasonable to assume that such assessment was not in the mind of the Legislature.

*Nevada National Bank.*

| | |
|---|---|
| Capital | $3,000,000 |
| Reserve | 600,000 |
| Profit | 398,817 |
| 30,000 shares | $3,998,817 |
| Book value | $133 |
| Market value | 185 |
| Difference | $ 52 |
| Assessable percentage of market value | 28% |
| Percentage of valuation of book value to market value | 72% |

*First National Bank.*

| | |
|---|---|
| Capital | $1,500,000 |
| Reserve | 1,000,000 |
| Profits | 157,141 |
| 15,000 shares | $2,657,141 |
| Book value | $177 |
| Market value | 250 |
| Difference | $ 73 |
| Assessable percentage of market value | 29% |
| Percentage of valuation of book value to market value | 70% |

*Crocker-Woolworth National Bank.*

| | |
|---|---|
| Capital | $1,000,000 |
| Reserve | 875,000 |
| Profits | 32,989 |
| 10,000 shares | $1,907,989 |

Book value.....$190.79
Market value add 40% to
book value, difference in
First National Bank..... 266.00

Difference .....$ 76.79
Assessable percentage of market value.....28.8%
Percentage of valuation of book value to
market value.....71%

*San Francisco National Bank.*

Capital .....$500,000
Profits ..... 102,605

5,000 shares.....$602,605
Book value.....$120.50
Market value in same way
as C. W. Bank..... 168.20

Difference .....$ 47.70
Assessable percentage of market value.....28%
Percentage of valuation of book value to
market value.....71%

*Bank of California.*

Resources as stated in the agreed
facts .....$5,906,403.08

20,000 shares.
Book value.....$295
Market value..... 405

Difference .....$110
Assessable percentage of market value..... 25%
Percentage of valuation of book value to
market value.....72.8%

It will thus be seen that by taking from the market value of the shares of the National banks mentioned and the Bank of California the value of the whole corporate assets, it would leave them to be assessed at the following percentages of the market value of their shares:

Nevada National Bank.....28%
First National Bank.....29%
Crocker-Woolworth National Bank.....28.8%
San Francisco National Bank.....28%
Bank of California.....25%

When these figures are compared with those shown by the assessments as made for the year 1900 of the same Banks, it will be seen that under the system suggested to have been that designed by the Legislature, a much more equitable assessment would have been reached and one largely avoiding the great discrimination of which complaint is made.

We append a statement showing the percentages of the market value of the shares, as appearing in the assessments as made for 1900.

Nevada National Bank.....60%
First National Bank.....64%
Crocker-Woolworth National Bank.....49%
San Francisco National Bank.....61%
Bank of California.....37%

Here and in this last calculation the franchise of the Bank of California is included; otherwise such percentage would be 28.5%.

Respectfully submitted,

E. S. PILLSBURY,

Solicitor and Counsel for Appellant.

IN THE

# SUPREME COURT

OF THE

## UNITED STATES.

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OCTOBER TERM, 1904.—No. 44.

THE SAN FRANCISCO NATIONAL BANK (A NATIONAL BANKING ASSOCIATION), *Appellant,*

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, *Appellee.*

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### BRIEF FOR APPELLEE.

Between the first Mondays in March and July, 1900, the Assessor of the City and County of San Francisco proceeded to and did assess, for purposes of taxation, the shares of stock of all national banks having their principal place of business in said City and County. This assessment was made under and in virtue of the provisions of an Act of the Legislature of the State of California, in effect March 14, 1899, amending section

3608 of the Political Code of that State, and adding sections 3609 and 3610 thereto, all relating to property liable to taxation for purposes of revenue. (Stats. 1899, p. 96.) The purpose of this act is served when an assessment and taxation of national bank shares is secured at a rate not greater "than is made or assessed upon " other moneyed capital in the hands of individual citi- " zens of this State."

The case of *The Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 57, presented the same questions to the United States Circuit Court of Appeals for the Ninth Circuit as are presented to this Court on this appeal, with the result that the judgment of the Circuit Court was affirmed in an able opinion expressive of the unanimous views of the Court of Appeals. The Solicitor for the Nevada National Bank, being satisfied that the views expressed in that opinion were consonant with law and would receive the indorsement and affirmance of this Court should an appeal be prosecuted therefrom, elected to abide by the result and no appeal was taken in that case. Subsequently the appeal of the San Francisco National Bank was presented to the Circuit Court of Appeals and the judgment of the Circuit Court, from which it was prosecuted, was affirmed on the authority of *Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 57, with which case it was identical in point of law, and of which it was a companion case.

A review of the legislative and judicial history of the attempts of the State of California to subject the

shares of stock of national banks, having their principal places of business in this State, to assessment and taxation, would be full of legal interest. Up to the passage of the Act of 1899 these attempts have been uniformly unsuccessful. It is believed that, in that act, the State has complied with all the limitations imposed by the Congress, and has honestly and fairly provided a system through which justice will be done the banks and the banks will be required to do justice to the State and her taxpayers. It is upon the validity of this act, considered in the light of Federal and State limitation, that this appeal must come to depend. And upon that test rests the right of a sovereign State to subject to their just share of the burdens of her government, the wealth within her limits invested in national bank stock. Congress has recognized the justice of requiring such property to bear its proper proportion of such burden, not alone that the Government of the State may be thereby sustained, but equally that no Federal agency shall be introduced into the commercial life of a State, free from the obligations which are imposed by the necessity of sustaining that Government upon her own banks and bankers. While it is important that no national bank should be the object of unjust discrimination at the instance of the State, it is equally essential that no State bank should be so subjected.

"All that has ever been held to be necessary is, that "the system of State taxation of its own citizens, of its

"own banks, and of its own corporations shall not make "a discrimination unfavorable to the holders of the "shares of national banks. Nor does the act of Con- "gress require anything more than this; neither its "language nor its purpose can be construed to go any "further. Within these limits the manner of assessing "and collecting all taxes by the States is uncontrolled "by the act of Congress."

*Davenport Bank* v. *Davenport,* 123 U. S. 84;
*Mercantile Bank* v. *New York,* 121 U. S. 138.

In so much as the exemption of one class of property must increase the burden to be borne by that which remains to be taxed, it is unjust to all other classes of property that any should be allowed to escape taxation. Every intendment, therefore, should be indulged in support of a law which bears upon its face evidence of a sincere desire to avoid discrimination, and to deal fairly with the national banks and their shareholders. While the right of every citizen to resist an unjust or excessive tax must be cheerfully conceded, the practical workings of an intricate svstem of taxation do not admit of that nicety of adjustment which will relieve all individual hardship or produce absolute uniformity of assessment.

"The most that can be expected from wise legisla- "tion is an approximation to the desirable end, and "the requirement of equality and uniformity found in "the Constitutions of some of the States is complied "with, when designed and manifest departures from "the rule are avoided."

*Stanley* v. *Supervisors,* 121 U. S. 550.

The determination of the questions here involved invites a high and broad minded view of the issues presented commensurate with the dignity and importance of the subjects to which they relate.

## I.

### CONSTITUTIONALITY OF THE ACT OF MARCH 14, 1899.

We pass to a consideration of the constitutionality of the Act of March 14, 1899, wherein serious questions press for determination. What solicitor for appellant has said, in definition of the power of the State to exercise the power of taxation, may be conceded. Whether the State possesses an inherent power as a necessary attribute of her sovereignty to tax all property within her limits, irrespective of the uses to which it may be put, until such power is restricted or limited by express Act of Congress, is immaterial in this inquiry. Whether section 5219 of the Revised Statutes be considered a limitation upon the taxing power of the State, or a grant to the State, of power to tax the shares of national banks, the all-important fact remains that the power to tax the shares of stock of national banks was conceded to the States by Act of Congress in section 5219 of the Revised Statutes.

By that section the power is confirmed in the State to "include in the valuation of the personal property of " the owner or holder of such shares" all shares in any national banking association; and it is expressly declared:

"But the Legislature of each State may determine " and direct the manner and place of taxing all the " shares of national banking associations located within " the State, subject only to the restrictions that the tax- " ation shall not be a greater rate than is assessed upon " other moneyed capital in the hands of individual citi- " zens of such States, and that the shares of any national " banking association owned by non-residents of any " State shall be taxed in the city or town where the " bank is located, and not elsewhere."

Subject to the two restrictions noted, the power of the State to tax the shares of capital stock of national banks is as great as its power to tax any other species of property found within the taxing jurisdiction, and such power is unlimited.

"Unless restrained by provisions of the Federal Con- " stitution, the power of the State as to the mode, form " and extent of taxation is unlimited, where the sub- " jects to which it applies are within the jurisdiction."

State Tax on Foreign Held Bonds, 15 Wall. 334;
*Kirtland* v. *Hotchkiss,* 100 U. S. 491;
*Mackay* v. *S. F.,* 113 Cal. 392.

And the Act of Congress recognizes this rule by declaring, "that the Legislature of each State may direct " and determine the manner and place of taxing all the " shares of national banking associations located within " the State."

**Uniformity of Assessment.**

We find, that, in consequence of this power in the State, the questions presented most frequently for de-

termination in connection with its exercise concern the force and effect of the two restrictions imposed by Congress; and, as the requirement, that the shares of non-residents shall be taxed at the locality in which the bank is situated, is unambiguous and easily complied with, the great volume of litigation has to do with the interpretation of the first restriction: "that the taxation shall "not be at a greater rate than is assessed upon other "moneyed capital in the hands of individual citizens "of such State."

At the outset it may be conceded that the requirement that taxation shall not be "at a greater rate" means that the assessment, as well as the amount levied in proportion to the assessment, shall not be at a greater rate.

And by that concession we do not desire to be understood as conceding that each individual variation, between assessment of national bank shares and other taxable property, would constitute a ground for successful assault upon the assessment. Individual variations are unavoidably incident to every system of taxation, are so recognized by the Courts, and are condoned accordingly. It is only under a state of facts which discloses a preconcerted understanding on the part of the Assessor, or as a result of operations of the State statute, to discriminate against the shares of national banks, that the courts will declare an assessment void on that ground.

As the Supreme Court says, in *Stanley* v. *Supervisors,* 121 U. S. 550:

"Absolute equality and uniformity are seldom, if "ever, attainable; the diversity of human judgments, "and the uncertainty attending the human evidence, "preclude the possibility of this attainment. Intelli- "gent men differ as to the value of most common things "before them—of animals, houses and lands in con- "stant use. The most that can be expected from wise "legislation is an approximation to the desirable end; "and the requirement of equality and uniformity found "in the Constitutions of some of the States is complied "with, when designed and manifest departures from "the rule are avoided."

And it is accordingly the rule that Courts will not interfere with an assessment of property at its full value, on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers, whose acts of under-valuation create the discrimination, intentionally and habitually violate the law by assessing property at less than its true value.

*Bank* v. *Kimball,* 103 U. S. 722;
*Supervisors* v. *Stanley,* 105 U. S. 305;
*Bank* v. *Perea,* 147 U. S. 67.

**"Other Moneyed Capital."**

There is another settled construction upon which it may be possible to agree. The term "other moneyed "capital," as used in this section, has received what

may be considered a settled interpretation, in the light of which the consideration of this case should proceed.

In the very recent case of *National Bank* v. *Mayor, etc., of Baltimore,* 100 Fed. 29, the Circuit Court of Appeals for the Fourth Circuit says:

"The words 'moneyed capital' not having been de-
" fined by the statute, it has been left to the courts to
" interpret them, and they have been so frequently con-
" sidered by the Supreme Court of the United States
" that there is little difficulty in ascertaining what that
" Court construes them to mean. The leading case is
" *Mercantile Nat. Bank* v. *City of New York,* 121
" U. S. 157, and the last case is *First National Bank of*
" *Aberdeen* v. *Chehalis Co.,* 166 U. S. 440. In these
" two cases will be found a review of nearly all the
" decisions. It would serve no good purpose to restate
" them. The result of them all is that 'money capital'
" has been given a restricted meaning. It is the nature
" of the employment that fixes its character. * * *

"The policy and purpose of Congress was to protect
" the instrumentalities created by it from unfair com-
" petition, by requiring that all persons engaged in like
" business should pay upon the capital so employed a
" like and equal rate of taxation. *The true test* is the
" nature of the business in which the person is engaged,
" and that cannot be determined by the character of the
" investment. Moneyed capital does not mean all
" capital the value of which is measured in terms of
" money."

In short, only competing "moneyed capital" is required to be assessed at no less a rate than shares of stock of national banks.

*Mercantile Bk.* v. *New York,* 121 U. S. 154-7;
*Evansville Bank* v. *Britton,* 105 U. S. 322;
*National Bank* v. *Chehalis,* 166 U. S. 440.

The questions are so far narrowed, therefore, as to be confined to the inquiry whether the revenue laws of California, as found in its Constitution and statutes, including the Act of March 14, 1899, assume to impose a greater rate of taxation upon the shares of national banks than they impose upon other competing "moneyed capital."

We say this is the scope of the inquiry on this part of the case, for the reason that it is not alleged, nor is it a fact, that appellee has intentionally or unintentionally, discriminated against such shares, or that he has discriminated at all, other than by such discrimination as, it is alleged, will result from the revenue laws of the State. On the contrary, the appellant has deducted from the properties of the banks, which are legally elements in the estimation and determination of the value of its shares, the United States bonds held by such banks, although it was early declared by the United States Supreme Court that it was competent to include such bonds in the estimation of the value of the shares.

*Van Allen* v. *Assessors,* 3 Wall. 573;
*Bradley* v. *People,* 4 Wall. 459;
*People* v. *Commissioners,* 4 Wall. 244.

**Statement of the Concrete Question.**

We reiterate, therefore, the question is, on this branch of the case, whether the Constitution and laws of the State of California do, on their face, discriminate against national bank shares in their assessment and the assessment of other competitive moneyed capital.

And at the opening of this inquiry, the syllabus of the Supreme Court of the United States, in *Davenport Bank* v. *Davenport,* 123 U. S. 83, may be quoted with profit:

"Section 5219, Revised Statutes, respecting the taxa-
" tion of national banks, does not require perfect equal-
" ity between State and national banks, but only that
" the system of taxation in a State shall not work a dis-
" crimination favorable to its own citizens and corpora-
" tions, and unfavorable to the holders of shares of
" national banks. If a State statute creating a system of
" taxation does not, on its face, discriminate against
" national banks, and there is neither evidence of legis-
" lative intent to make such discrimination, nor proof
" that the statute works an actual and material discrim-
" ination, there is no case for holding it to be unconsti-
" tutional."

It will hardly be contended that this Act of 1899 discloses on its face any hostile legislative intent, so far as permitting such deductions from national bank stock as are permitted to other moneyed capital.

On the contrary, in the enactment of the Act of March 14, 1899, the Legislature of the State repeatedly emphasized its intent that no discrimination should

be made against the holders of national bank shares. Thus it is provided in the act (sec. 3609):

"And the assessment and taxation of such shares of "stock in said national banking associations shall not "be at a greater rate than is made or assessed upon "other moneyed capital in the hands of individual citi- "zens of this State."

And again, in the same section, it is provided: "and "said shares shall be valued and assessed as is other "property for taxation."

The only discrimination on the face of the statute, if that be a discrimination, is in the exemption of shares of stock of other corporations from assessment.

With this in mind let us consider the revenue system of California, with particular reference to the validity of the Act of March 14, 1899.

The statute is attacked on several grounds, the *first* and perhaps the most important of which, is, that no deduction can lawfully be allowed to the owners of national bank stock for unsecured debts owing by them to *bona fide* residents, while such a deduction is permitted and required to be made from solvent credits unsecured; and, *second,* that no assessment of the shares of national bank stock can be made while the State law (Sec. 3608, Pol. Code) exempts, *eo nomine,* shares of stock in certain other corporations from assessment and taxation.

We will discuss these questions in their order.

A.

**Is a Deduction Allowed to the Owners of National Bank Stock from the Value of their Stock of Debts Owing by them to Bona Fide Residents of the State?**

This contention, as insisted upon by appellant, involves the validity of that portion of the Act of 1899 which provides for such deduction. Section 3609, Political Code, as found in that Act, provides:

"But in the assessment of such shares, each stock-
" holder shall be allowed all the deductions permitted
" by law to the holders of moneyed capital in the form
" of solvent credits, in the same manner as such deduc-
" tions are allowed by the provisions of paragraph six
" of section thirty-six hundred and twenty-nine of the
" Political Code of the State of California. * * *
" And the assessment and taxation of such shares of
" stock in said national banking association shall not be
" at a greater rate than is made or assessed upon other
" moneyed capital in the hands of individual citizens of
" this State."

The attitude of appellant is, not that the Act has failed to make provision for the deduction which it claims, and which the Assessor alleges he is prepared to grant, but that the clause of the statute permitting such deduction is unconstitutional and void.

Sec. 1, Art. XIII, Const. of Cal.

In the first place, the provision which is attacked as being void is obviously designed for the benefit of complainant's stockholders, and is in conformity with ap-

pellant's construction of the Act of Congress requiring that such shares shall not be assessed at a greater rate than is assessed upon other moneyed capital. The Act of the Legislature gives it such right, but it complains that it has been given it by the statute, and not by the Constitution. Can it be heard to complain because a right is accorded him of which he will be permitted to take advantage, and which brings this portion of the statute unquestionably within the provisions of the only act which affords him protection? What beneficial interest has complainant in avoiding a portion of a statute which was designed for its benefit?

And even if this Act of 1899 had contained no such provision, would it result therefrom that it would be void?

This question was answered by the Supreme Court of the United States in *Supervisors* v. *Stanley,* 105 U. S. 305-311, as follows:

"Accepting, therefore, as we must, the Act of 1866, " as construed by the Court of Appeals of New York, " as not authorizing any deduction for debts by a stock- " holder of a national bank, is it, for that reason, void? " This cannot be true in its full sense, for there is no " reason why it should not remain the law as to banks " or banking associations organized under the laws of " the State, or as to private bankers, of which there no " doubt exists a large number of both classes.

"What is there to render it void as to a stockholder in " a national bank who owes no debts which he can " deduct from the assessed value of his shares? The " denial of this right does not affect him. He pays the

"same amount of tax that he would if the law gave him "the right of deduction. He would be in no better "condition if the law expressly authorized him to "make the deduction. What legal interest has he in "a question which only affects others? Why should he "invoke the protection of an Act of Congress in a case "where he has no right to protect? Is a Court to sit "and decide abstract questions of law in which the "parties before it show no interest, and which, if de-"cided either way, affect no right of theirs?

"It would seem that if the Act remains a valid rule "of assessment for shares of State banks and for indi-"vidual bankers, it should also remain the rule for "shareholders of national banks who have no debts to "deduct, and who could not, therefore, deduct any-"thing if the statute conformed to the requirements of "the Act of Congress."

And again, in the same case, after reviewing a number of authorities, the Court says (page 315):

"It follows that the Assessors were not without au-"thority to assess national bank shares; that where no "debts of the owners existed to be deducted the assess-"ment was valid, and the tax paid under it a valid tax. "That in cases where there did exist such indebtedness, "which ought to be deducted, the assessment was *void-*"*able* but not void. The assessing officers acted within "their authority in such cases until they were notified "in some proper manner that the shareholders owed "just debts which he was entitled to have deducted."

This case has been affirmed in *Palmer* v. *McMahon*, 133 U. S. 667.

If, therefore, appellant can be heard to complain of a provision in the law favorable to its shareholders, and

of which the appellee alleges his intention of giving it the full benefit, and its contention that this beneficial provision of the statute is void in so far as it denies such deduction, where the shareholders are entitled to it, is sustained, it by no means follows that the Assessor is without power to make such assesment, or that the assessment, when made, would be anything more than voidable; on the contrary, it would not be either void or voidable until a showing was made and sustained that the shareholders were indebted, in unsecured debts, to *bona fide* residents of the State.

Such an assessment, made in the presence of a showing that the stockholder was so indebted, and had complied with the provisions of the law entitling him to such deduction, would disclose a voidable assessment as to such stockholder. But, as to all other stockholders who fail to avail themselves of the deduction, the assessment would be perfectly good.

But that would indeed be a peculiar principle, which would permit a complainant to enter a Court of equity for the purpose of claiming the protection of the Act of Congress, and under cover of such pretense to permit it to attack the features of a State law designed for its benefit, and in conformity with that Act.

The right, however, to enjoy that deduction from solvent credits of debts due to *bona fide* residents is not without its conditions. The Constitution of California has not conferred that right, but has simply provided:

"The Legislature *may* provide, except in the case of "credits secured by mortgage or trust deed, for a de-

" duction from credits of debts due to *bona fide* resi-
" dents of this State."

Sec. 1, Art. XIII, California Constitution.

This section is not self-executing, and it remained for the Legislature to make provision for such a reduction before it was available to the taxpayer. This provision was made in virtue of the provisions of section 3629, subdivision 6, of the Political Code. In defining what property shall be separately stated in the statement of the taxpayer, it is provided therein, with respect to solvent credits:

"6. All solvent credits, unsecured by deed of trust, " mortgage, or other lien on real or personal property, " due or owing by such person, or any firm of which " he is a member, or due or owing to any corporation " of which he is president, secretary, cashier, or man- " aging agent, deducting from the sum total of such " credits such debts only, unsecured by trust deed, mort- " gage, or other lien on real or personal property, as " may be owing by such person, firm or corporation, " to *bona fide* residents of this State. *No debt shall be* " *deducted unless the statement shows the amount of* " *such debt as stated under oath in aggregate; provided,* " *in case of banks the statement is not required to show* " *the debt in detail, or to whom it is owing;* but the " Assessor shall have the privilege of examining the " books of such banks to verify said statement."

Appellant would be entitled to a deduction, on account of debt due *bona fide* residents of California, from the value of its stock in any event, *only* after the condition here expressed in the statute granting such

right to all taxpayers had been complied with. No debt shall be so deducted unless the bank shall return, in its statement of property, the amount of debts due to such *bona fide* residents. Such debts need not be stated in detail, but a statement of the amount for the deduction of which the claim is asserted, must be made.

There is no showing here that any such statement has been made; that any such deduction has been demanded, or that any such indebtedness exists. On the contrary, appellant agrees (Record, pp. 83, 84) that no such statement was made or returned in accordance with section 3629 of the Political Code, or otherwise.

This brings appellant's case clearly within the rule laid down by the Supreme Court that, where a condition is imposed on the enjoyment of a right, such condition must be complied with before the right can be enforced.

Conceding, however, for the present, that that portion of the Act of March 14, 1899, which provides for the deduction from national bank stock of unsecured debts due *bona fide* residents, is in conflict with section 1, article XIII, of the Constitution of the State, it by no means follows that the Act is not enforceable; or that an assessment made in conformity with its remaining provisions would discriminate against the owners of national bank shares; or that such shares would be assessed at a greater rate than is or will be assessed upon the moneyed capital in competition therewith.

B.

**An Assessment of the Shares is an Assessment of the Net Assets of the Corporation.**

If, in the assessment of shares of stock, the value of such shares represents the difference between the gross assets of the bank and its liabilities, other than secured credits, it follows that such an assessment is the equivalent of an assessment of the assets of the banks minus its unsecured liabilities. If this be so, the method of assessment, required by Act of Congress, has been followed, by an assessment of the shares of stock without permitting a deduction from such shares of unsecured debts. To allow such deduction to the shareholder would be to allow a double deduction from such credits—once for the unsecured debts of the bank, and second, for the unsecured debts of the shareholders. This is manifestly not required by the Act of Congress, the requirements of which are met when an equal deduction is made, and which does not require that there should be any discrimination *in favor* of national bank shares.

A contention almost identical with the one now under discussion reached the Supreme Court of the United States in *National Bank of Wellington* v. *Chapman,* 173 U. S. 211, a case in which the revenue laws of Ohio allowed a deduction of debts from credits, but denied it to the holders of shares of stock. The position is stated thus in the opinion:

"The complaint is founded upon the allegation that "the owners of what is termed credits in the law of "Ohio (Rev. Stats., par. 2730) are permitted to de- "duct certain kinds of their debts from the total "amount of their credits, and such owners are assessed "upon the balance only, while no such right is given "to owners of shares in national banks. The claim is "that shares in national banks should be treated the "same as credits, and their owners permitted to deduct "their debts from the valuation. The owners of prop- "erty other than credits are not permitted to deduct "their debts from the valuation of that property." (P. 213.)

This would appear to be a case almost identical in fact and principle with the case at bar.

The Court said (p. 215):

"Under the Ohio law the shares in national and also "in State banks are what is termed stocks or invest- "ments in stocks, and are not credits from which debts "can be deducted. As between the holders of shares in "incorporated State banks and national banks on the "one hand, and unincorporated banks or bankers on "the other, we find no evidence of discrimination in "favor of unincorporated banks or bankers. In re- "gard to this latter class, there is no capital stock, so "called, and section 2759 of the Revised Statutes there- "fore makes provision, in order to determine the "amount to be assessed for taxation, for deducting the "debts existing in the business itself from the amount "of moneyed capital belonging to the bank or banker "and employed in the business, and the remainder is "entered on the tax book in the name of the bank or

" banker, and taxes assessed thereon. This does not " give the unincorporated bank or banker the right to " deduct his general debts disconnected from the busi- " ness of banking, and not incurred therein, from the " remainder above mentioned. It cannot be doubted " that under this section those debts which are discon- " nected from the banking business cannot be deducted " from the aggregate amount of the capital employed " therein. The debts that are incurred in the actual " conduct of the business are deducted so that the real " value of the capital that is employed may be deter- " mined and the taxes assessed thereon.

"This system is, as nearly as may be, equivalent in " its results to that employed in the case of incorporated " State banks. Under the sections of the Revised Stat- " utes which relate to the taxation of these latter classes " of banks (sec. 2762, etc.), the shares are to be listed " by the auditor at their true value in money, *which* " *necessarily demands the deduction of the debts of the* " *bank, because the true value of the shares in money is* " *necessarily reduced by an amount corresponding to* " *the amount of such debts.* In order to arrive at their " true value in money the bank returns to the auditor " the amount of its liabilities as well as its resources. " Thus in both incorporated or unincorporated banks " the same thing is desired, and the same result of as- " sessing the value of the capital employed in the busi- " ness, after the deduction of debts incurred in its " conduct, is arrived at in each case as nearly as is pos- " sible, considering the difference in manner in which " the moneyed capital is represented in unincorporated " banks as compared with incorporated banks which " have a capital stock divided into shares. That mathe-

" matical equality is not arrived at in the process is " immaterial. It can not be reached in any system of " taxation, and it is useless and idle to attempt it. Equal- " ity, as far as the differing facts will permit, and as " near as they will permit, is all that can be aimed at " or reached. That measure of equality, we think, is " reached under this system. So far as this point is " concerned, it is entirely plain that there is no dis- " crimination between unincorporated banks and bank- " ers on the one hand and the holders of shares of stock " in national banks on the other."

In this connection, we quote from *Bressler* v. *Wayne Co.*, 32 Neb. 834.

This case involved the right of a holder of national bank shares to deduct his *bona fide* debts in listing his shares for taxation.

In the opinion the leading cases of the United States Supreme Court, on the questions of deductions and exemptions, are considered and the former doctrine of the State Court overruled.

"The fact that the unincorporated bank is entitled " to such deduction is no valid reason why the debts of " the owner of national bank stock should be deducted " from the value of his shares in assessing them. Na- " tional banks are assessed solely by taxing the shares " of stock. In unincorporated banks there are no " shares of stock to tax, and the Legislature, of neces- " sity, was compelled to adopt a different method of " taxing them by assessing the value of the capital " therein invested, which is practically the difference " between the value of the assets and the amount of " liabilities. *The shares of a national bank do not rep-*

" *resent the assets of the bank, but rather the difference*
" *between the value of its property and its liabilities.*
" While the method of assessing national banks is dif-
" ferent from that by which a private bank or banker is
" assessed, the rule of uniformity is preserved, so that
" it cannot be said that the law of the State requires that
" national banks shall be taxed at a greater rate than is
" imposed upon the capital invested in the State banks."

In *Chapman* v. *Bank of Wellington,* 56 Ohio, 310, affirmed in *National Bank of Wellington* v. *Chapman,* 173 U. S. 205, the Court, in considering section 2762, Revised Statutes of Ohio, providing that shares of stockholders in incorporated banks, whether State or national, shall be "listed at their true value in money" (p. 328), holds that, in fixing the true value of the shares in money, the bank deducts its debts from its credits, so that it pays taxes only on its net valuation. Unincorporated banks are taxed in the same manner by deducting debts from credits, so as to pay only on the net capital stock. By section 2759 of the laws of Ohio, in the case of incorporated State banks, after the deduction of debts from credits is made, and the net value of each share of stock thus ascertained, the holder of such stock is compelled to pay taxes upon such value, and is not permitted to deduct his legal *bona fide* debts therefrom. In the case of the unincorporated banks, when the net value of the capital is ascertained, the bank pays the tax thereon, and the several owners of the capital are not allowed to deduct any of their individual debts from their shares of such capital. It is

thus clear that moneyed capital invested in national banks is placed upon an exact equality with moneyed capital invested in State banks, and this is all that can be reasonably asked for national banks.

"To place the holder of national bank shares into the "class of bankers, and treat his shares as stocks until "the net value is fixed, and then change his stock into "credits and take him out of the class of bankers and "place him into the class of private individuals, so as "to enable him still further to reduce his stock thus "changed into a credit, by deducting therefrom his "legal *bona fide* debts, would be discriminating in "favor of such national bank shareholder, and would "be giving him two chances to escape taxation while "other bankers and private individuals have but one.

"We think that national bank shares belong to the "class known as stocks, and not to the class known as "credits, and that such shares cannot have the double "advantage of both stock and credits; and that the "holders of such shares have no right under the stat-"utes, State and national, to deduct their legal *bona* "*fide* debts from the assessment value of such shares."

And in *Van Allen* v. *Assessor,* 3 Wall, *supra,* where it is held that national bank shares are taxable in the hands of the owner, regardless of the fact that part or whole of the capital of the bank is exempt from taxation, the Court, in considering the relation of the shares of stock to the property possessed by the bank, says:

"The corporation is the legal owner of all the prop-"erty of the bank, real and personal; and within the "powers conferred upon it by charter and for the pur-

" poses for which it is created, can deal with the cor-
" porate property as absolutely as a private individual
" can deal with his own. * * * The interest of the
" shareholder entitles him to participate in the net
" profits earned by the bank in the employment of its
" capital, during the existence of its charter, in propor-
" tion to the number of his shares; and upon its disso-
" lution or termination, to his proportion of the
" property that may remain after the payment of its
" debts."

The general rule is that a share of stock is a right to a proportionate part in the dividends and profits of the corporation and to a share of its net assets upon dissolution.

That the shareholder is entitled to a part only of the net assets, or assets remaining after the payment of debts, is supported by these cases:

*Plumpton* v. *Bigelow*, 93 N. Y. 599;
*Field* v. *Pierce*, 102 Mass. 261;
*Jones v. Davis*, 35 Ohio, 477;
*Tax Collector* v. *Insurance Co.*, 42 La. Ann. 1172;
*Farrington* v. *Tennessee*, 95 U. S. 687;
*People* v. *Bank of D. O. Mills*, 123 Cal. 60.

C.

**No Solvent Credits Escape Assessment Under the Constitution and Laws of the State of California.**

It is the declaration of section 1, article XIIII, of the Constitution of this State that:

"All property in the State not exempt under the laws
" of the United States shall be taxed in proportion to

"its value to be ascertained as provided by law. The "word 'property,' as used in this article and section, is "hereby declared to include moneys, *credits, stocks,* "dues, *franchises,* and all other matters and things, "real, personal and mixed, capable of private owner- "ship. * * * The Legislature may provide, ex- "cept in case of credits secured by mortgage or trust "deed, for a deduction from credits of debts due to "*bona fide* residents of this State."

Sec. 3607, Pol. Code.

And section 3617, Political Code, defines credits as follows:

"The term 'credits' means those solvent debts not "secured by mortgage or trust deed, owing to the per- "son, firm, corporation, or association *assessed.* The "term 'debts' means those unsecured liabilities owing "by the person, firm, corporation or association *assessed* "*to bona fide residents of this State,* or firms, associa- "tions, or corporations doing business therein; but "credits, claims, debts and demands due, owing or ac- "cruing for or on account of money deposited with sav- "ings and loan corporations shall, for the purpose of "taxation be deemed and treated as an interest in the "property of such corporations, and shall not be as- "sessed to the creditor or owner thereof."

It is to be noted, therefore, that the permission to deduct unsecured debts from solvent credits unsecured does not relieve any portion of the wealth of the State from taxation, but simply contemplates the assessment and taxation of such debts so deducted in the hands of and as so much property belonging to the creditor. *All credits are assessed.*

This plan of taxation finds its basis in the opinion of the Supreme Court of the United States in State Tax on Foreign Held Bonds, 15 Wall. 324, where it is said:

"But debts owing by corporations, like debts owing "by individuals, are not property of the debtors in any "sense; they are obligations of the debtors, and only "possess value in the hands of creditors. With them "they are property, and in their hands they may be "taxed. To call debts property of the debtors is simply "to misuse terms. All the property there can be in "the nature of things in debts of corporations belongs "to the creditors to whom they are payable, and fol- "low their domicile, wherever they may be."

And it is to be further noticed that not all unsecured debts are deductible from the solvent credits, unsecured, of the debtor. *Only such unsecured debts can be deducted as are owing to bona fide residents of the State.* Such debts owing abroad are not deductible, because they are not subject to the taxing jurisdiction of California in the hands of the creditor.

The Supreme Court of the State, in *People* v. *Hibernia Bank,* 51 Cal. 247, adopted an interpretation of the taxing system of the State, in which it was held that the taxation of credits and of the other property of the State must result in double taxation. The Court says:

"It may not be possible in every case to show that the "debtor has paid the tax assessed to the creditor. But "it admits of mathematical demonstration—if other "property in the State has been assessed at its value— "that the money which shall ultimately satisfy the debt "(if it is ever satisfied) has paid the tax. If it were

" possible to assess all the property in the State at the " same moment of time, it would be clear to every mind " that an assessment of a credit was an attempt to trans- " fer to it value elsewhere assessed. * * * But if " the debtor is found to be the owner of one thousand " dollars, and is assessed for that sum, and his creditor " is found to be the owner of his note for one thousand " dollars, and is assessed for a like sum; and if, the day " after the visit of the Assessor to the creditor, the " debtor shall pay his note, it is clear that the same " value has been twice taxed," etc.

For the purpose of conforming the revenue system of the State to the reasoning of this decision, a constitutional convention was called in which provision was made for the assessment of credits, after the deduction from their value of the liabilities assessable to the creditors.

It follows, therefore, that no moneyed capital in the form of credits escapes taxation under the tax laws of this State.

The debts, though deducted, are assessed to the creditors—in whose hands only are they property, and as such taxable.

While, therefore, a deduction is so allowed, it is a deduction of such unsecured debts only as are assessable or assessed to *bona fide* residents of the State.

Those liabilities which are debts of the debtor are also credits of the creditor, and it is the contemplation and purpose of the law that such liabilities shall be assessed and taxed in the hands of owners thereof.

Under our theory of taxation, as considered and de-

fined in *People* v. *Hibernia Bank,* 51 Cal. 243, and accepted by constitutional amendment, the debtor pays the tax. If this doctrine is sound, it follows that, while such deduction is permitted, the tax nevertheless falls upon the debtor.

The conclusion on this branch of the question must be that the holders of national bank stock are not entitled to deduction from the valuation of their stock of unsecured debts due to *bona fide* residents.

## D.

### Does the Exemption of Shares of State Banks Discriminate Against National Banks?

It is the further contention of appellant that the Act of March 14, 1899, imposes a greater rate of taxation upon the shares of national banks than is imposed upon other moneyed capital, in this: that the shares of stock in corporations organized and existing under the laws of the State, and having their corporate property therein, are exempt from taxation *eo nomine.*

Before entering upon a full discussion of this contention it may not be *mal apropos* to revert to the rule of law governing the interpretation of State statutes, under which the Federal Courts are held to the interpretation placed upon such statutes by the State Court. No citation of authorities is necessary to support the rule, which is also cited and relied upon by appellant.

As hereinbefore quoted, section 1, article XIII, of the Constitution, requires the taxation of *all* property

in the State, and defines the term "property" to include "stocks."

The question was early called to the attention of the State Supreme Court, whether, under this section, it was possible to tax the entire corporate property of the corporation, and also its shares of stock, at their actual value, without violating the provision against *double* taxation. It was insisted that to tax the entire corporate property and also the shares, would be double taxation. This question was passed upon in *Burke* v. *Badlam,* 57 Cal. 601, where the Court, in an opinion by Mr. Justice Ross, says:

"To assess all of the corporate property of the cor-
" poration and also to assess to each of the stockholders
" the number of shares held by him, would, it is mani-
" fest, be assessing the same property twice, once in the
" aggregate to the corporation, the trustees of all the
" stockholders, and again separately to the individual
" stockholders in proportion to the number of shares
" held by each."

The theory upon which this holding is based, is that the assessment of the stock of a corporation to the stockholders and the assessment of the property of the corporation to the corporation, would be an assessment of the same property twice; that the stock has no intrinsic value, over and above the value of the property of the corporation which it stands for and represents. As we have seen already, the assessment of the stock of a corporation, at its actual value, is simply the assessment of the net assets of the corporation. The stocks, there-

fore, under the California system of assessment, as interpreted by her own Courts, stand for and represent the property of the corporation; and an assessment of the property is equivalent, in law, to an assessment of the stock. This view is well illustrated by the subsequent holding in *San Francisco* v. *Fry,* 63 Cal. 470, to the effect that, where the property of a corporation was situated without the State, and could not be assessed by the State, that double taxation was not possible, and *the stock should be assessed.*

*Stanford* v. *San Francisco,* 131 Cal. 34.

The decision in *Burke* v. *Badlam, supra,* was accepted by the Legislature as a correct exposition of the laws of the State, and the principle therein established was incorporated in the laws of the State (sec. 3608, Pol. Code) as follows:

"Sec. 3608. Shares of stock in corporations possess "no intrinsic value over and above the actual value of "the property of the incorporation which they stand "for and represent; and the assessment and taxation of "such shares, and also the corporate property, would "be double taxation. Therefore, all property belong-"ing to corporations shall be assessed and taxed. But "no assessment shall be made of shares of stock in any "corporation, save and except in national banking as-"sociations, whose property other than real estate is "exempt from assessment by federal statutes."

*S. V. W. W.* v. *Schottler,* 62 Cal. 115;

*San Francisco* v. *Anderson,* 103 Cal. 69;

*Germania Trust Co.* v. *San Francisco,* 128 Cal. 589;
*Bank of California* v. *San Francisco,* 142 Cal. 276.

That the rule so announced by the Supreme Court of California, and accepted by her Legislature, is sound, under her system of taxation, can hardly be open to question. We are aware there are numerous decisions rendered in the interpretation of other tax laws, holding that a share of stock is separate and distinct property which may be so treated for purposes of taxation, and which is not taxed in the taxation of corporate property. But the question here is not what rule would be adopted by another Court were the same questions submitted to it. The question is, what construction has been placed upon her revenue laws by the Courts of California? Is it possible, under her tax laws, so interpreted and enforced, to avoid a discrimination against national bank shareholders, by an assessment of the stock of such banks and an assessment of the property of competing corporations?

Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of a corporation is greatly in excess of the value of its property, other than its franchise. This fact was called to the attention of the State Court, which recognized the force of this suggestion, and held the Constitution and laws of the State require the as-

sessment and taxation of the franchise of the corporation, and that its value, for purpose of such assessment and taxation, was properly ascertained by deducting from the market value of its stock the value of its corporate property, and assessing the remainder as franchise.

Thus: Let us assume that a state bank possesses $5,000,000 worth of assessable property other than franchise. Its stock has an aggregate market value of $6,000,000. The assessable value of its franchise is properly ascertained by deducting $5,000,000, the value of its assessable property, other than franchise, from the value of its stock, $6,000,000, and assessing the balance, $1,000,000, as the value of its franchise.

*San Jose Gas Co.* v. *January,* 57 Cal. 614;
*S. V. W. W.* v. *Schottler,* 62 Cal. 100-112;
*Ottawa Glass Co.* v. *McCalet,* 81 Ill. 556;
*Burke* v. *Badlam,* 57 Cal. 594;
*Bank of California* v. *San Francisco,* 142 Cal. 276.

The case of *Bank of California* v. *San Francisco,* 142 Cal. 276, decided since the decision of the case of *Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 57, reaffirms the rule announced in *Burke* v. *Badlam,* 57 Cal. 594, and may be considered as settling the interpretation of the revenue laws of California in favor of the assessment and taxation of the franchises of all domestic corporations. That case also affirms the system

by which the value of such franchises may be ascertained by the Assessor, which contemplates the deduction from the agregate market value of its stock of the value of its taxable property other than franchise and the assessment of the remainder as franchise value. In this way the total value of the shares of the corporation is taxed through the taxation of the property of the corporation which constitutes such value. The Court states it thus:

"It is clear that if the laws of this State properly ex-
" press the intention that everything that gives value to
" the shares of a corporation shall be assessed as prop-
" erty of the corporation, the true value of those shares
" is a most important element in determining the value
" of such property."

Under the California system of taxation of corporations, therefore, the full market value of the stock of such corporations is assessed, by an assessment of their entire property, including their franchise. Where such property is situated in another State, and is not subject to the taxing jurisdiction of the State, the same end is attained by an assessment of the stock.

*S. F.* v. *Fry,* 63 Cal. 470.

**Two Lines of Decisions.**

There is a further distinction which should be noted in a discussion of this question, and it has reference to the two general classes of legislation through which the different States have attempted the taxation of the property of national banks. It has been the mistaken

policy of some States to place the burden directly upon the tangible property of the bank, and, in other States, the tax has been very properly assessed upon the shares of stock, with the property of the bank as the basis of valuation. This diversity has given rise to two lines of decisions in the Supreme Court of the United States, one of which has its culmination in *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, and the other is represented by *Palmer* v. *McMahon,* 133 U. S. 660; *Bank of Redemption* v. *Boston,* 125 U. S. 60; *Davenport National Bank* v. *Davenport,* 123 U. S. 83; and *Mercantile Bank* v. *New York,* 121 U. S. 138. The Owensboro case drew into question the validity of a statute of Kentucky which imposed a *direct* tax upon the corporate property and franchise of the national bank, without regard to the shares of stock issued by it. The tax was upon the property and not upon the shares of stock. The tax was resisted upon two principal grounds: 1. That the taxes complained of were unlawful, because they were not laid on the shares of stock in the names of the shareholders, but were actually imposed upon the property of the bank, contrary to the Act of Congress; 2. That if the taxes were not on the property of the bank, then they were imposed on its franchise or right to do business, derived from the laws of the United States.

The act of Congress confers power upon the States, not to tax the property or franchise of a national bank, but only to tax the shares of such banks in the hands of

the shareholders. Whether there is an equivalency between the taxation of the properties of a national bank and the taxation of its stock, is a question of valuation only, since it is not pretended that the assessment of the shares is in fact the assessment of the bank property. But in ascertaining the *valuation* at which the stock shall be assessed the net assets of the bank may be determined to the end that the actual value of the stock may be ascertained. That the value of the stock is dependent upon the assets of the bank, is admitted by the Act of Congress in providing for a deduction from the value of the shares, of the value of the real estate of the bank.

The Owensboro case was decided in this conclusion:

"The proposition then comes to this: Nothing but " the shares of stock in the hands of the shareholders of " a national bank can be taxed, except the real estate of " the bank. The taxes which are here resisted are not " taxes levied upon the shares of stock in the names of " the stockholders, but are taxes levied on the franchise " or intangible property of the corporation. Thus, " bringing the two conclusions together, there would " seem to be no escape in reason from the proposition " that the taxing law of the State of Kentucky is be- " yond the power conferred by the Act of Congress, " and is therefore void for repugnancy to such Act."

The Act of 1899 is open to no such criticism. It follows the requirement of the Act of Congress and imposes the tax, not upon the franchise or intangible property of the bank, but upon the shares of the bank in the hands of its shareholders.

This may be considered the vital point of attack upon the law. And in the decision of this question we are concerned most with an attempt to make the position which we occupy thoroughly understood by the Court.

As has been asserted the question is *not* whether an assessment of the property of a national bank is the equivalent, in fact and law, of the assessment of the shares of stock of such bank in the hands of its shareholders. The Supreme Court of the United States, in the Owensboro and kindred cases, has held that it is not equivalent. So, also, has the Supreme Court of California held, in *First National Bank* v. *San Francisco,* 129 Cal. 94, and like cases. The Act of 1899 does not assume to tax the property of national banks upon the theory that such a tax would be the equivalent of a tax upon their shares. This Act does not place a tax upon such property at all, but it does place a tax upon the shares of stock of such banks. So that we are not here concerned with the question considered in the Owensboro case. We are not called upon to maintain the proposition that a tax upon the possessions of a national bank is the same as a tax upon its shares. We impose no such tax. Our tax is levied upon the shares of stock. Let this be understood.

But California does not levy a direct tax upon the shares of stock of California corporations the property of which is assessed and taxed in California. It is on this fact that the attack is based. Not that we do not tax the shares of stock of national banks directly, but that we tax the shares of stock of California corpora-

tions indirectly. If the shares of stock of local corporations escape taxation under the California system, it may not be doubted that no tax can lawfully be levied upon shares of stock of national banks. So that the real question here is: Are the shares of stock of competing California corporations taxed under the California system?

The real question therefore is whether, under the California system, the assessment and taxation of all the property of California corporations is equivalent to the assessment and taxation of the shares of stock of California corporations. Not whether the assessment and taxation of the property of a national bank is equivalent to the assessment and taxation of its shares. Not whether the assessment and taxation of the property of a California corporation is equivalent to the assessment and taxation of the shares of stock of a national bank. But whether the assessment and taxation of all the property of a California corporation is the equivalent of the taxation of the shares of stock of such corporation.

In short, whether the statement contained in section 3608, that shares of stock possess no intrinsic value over and above the actual value of the property which they stand for and represent, and that the assessment and taxation of such shares, and also of the corporate property, would be double taxation, are legal lies; or whether those declarations and the holdings of the State Supreme Court in support thereof, are true under the revenue laws of California.

It certainly cannot be successfully contended that California must subject the corporate property within her taxing jurisdiction to double taxation in order to tax national bank stock but once. The question, then, is whether California has provided for a tax upon the shares of stock of her corporations; and this brings us to the question whether, *under her system as interpreted by her Courts,* the assessment and taxation of all the corporate property is equivalent to the assessment and taxation of the shares of stock of such corporations. And, as an interpretation of the revenue laws of a State by its own Courts is binding upon a Federal Court, we are concerned here only with the views of the Supreme Court of California upon this point. It may be said, however, that the Supreme Court of that State is not alone in the views expressed, very eminent authority in sister States having taken the same view.

*Rice* v. *National Bank,* 23 Minn. 280;
*Commrs.* v. *National Bank,* 48 Md. 117;
*Lackawanna* v. *National Bank,* 94 Pa. St. 221;
*Rosenberg* v. *Texas,* 67 Tex. 578;
*Gordon* v. *Mayor, etc.,* 5 Till. 231;
*Blythe* v. *Brannin,* 3 Zabr. 484;
*Johnson* v. *Commonwealth,* 7 Dana, 342;
*Tax Cases,* 12 G. & Johns. 117;
*Smith* v. *Burley,* 9 N. H. 423;
*Williams* v. *Weaver,* 75 N. Y. 31;
*New Haven* v. *Bank,* 31 Conn. 106.

And there is authority of equal respectability holding to the contrary. But we are here concerned only with the views which the Supreme Court of California has taken on this question. For this is a question, we repeat, whether, under her revenue system, the assessment of all corporate property is equivalent to the assessment of the shares of the corporation. And in passing upon that question the Supreme Court of that State has held, in so many terms, that such equivalency exists—that it exists to such an extent as to leave an assessment of both the corporate property and the shares open to the objection that the same property is thereby taxed twice.

*Burke* v. *Badlam,* 57 Cal. 601;
*San Francisco* v. *Anderson,* 103 Cal. 70, 71;
*Germania Trust Co.* v. *San Francisco,* 128 Cal. 595;
*People* v. *National Bank,* 123 Cal. 53-60;
*S. V. W. W.* v. *Schottler,* 62 Cal. 69;
*San Francisco* v. *Fry,* 63 Cal. 470;
*Bank of California* v. *San Francisco,* 142 Cal. 276.

It is not necessary here to restate the holding of those cases. They are without conflict upon the principle that the assessment of the corporate property and also the stock of the corporation would be the taxation of the same property twice, since the taxation of the corporate property is the equivalent, in fact and in law, of the taxation of the stock. Judge Sawyer, in *San Fran-*

*cisco* v. *Mackay*, 21 Fed. 539, 540; 10 Saw. 302, stated the conclusion thus:

"The Supreme Court of the State, in *Burke* v. *Bad-*
" *lam*, 57 Cal. 594, held that the Constitution of the
" State does not authorize or require, but, on the con-
" trary, forbids, a double taxation of property; that it
" would be double taxation to tax all the property of a
" corporation to the corporation, and then assess to each
" stockholder the shares of stock in it held by him.
" This decision by the State Supreme Court, giving a
" construction to the State Constitution, is controlling
" in this Court. The corporation is the immediate pri-
" mary owner of all the property of the corporation,
" the right of the stockholders in it being only deriva-
" tive and secondary. The Constitution and laws re-
" quire all property to be assessed and taxed to the
" owner, and the legal presumption is, as held in the
" case cited, nothing to the contrary appearing, that all
" property of a corporation has been assessed to the
" corporation. * * * That being so, the assess-
" ment of the stock in question to defendant is, as to the
" amount assessed, a second or double assessment of the
" same property, and, as such, void."

Nor do we believe that the case of *Miller* v. *Heilbron*, 58 Cal. 133, can be successfully relied upon as overruling the authority of *Burke* v. *Badlam, supra.* As the Supreme Court of California has said, in *McHenry* v. *Downer*, 116 Cal. 28, the case of *Miller* v. *Heilbron*, although decided a month or two after the decision in *Burke* v. *Badlam*, arose on a state of facts and under a statute in existence prior to those considered in *Burke* v. *Badlam*. In fact, the Act, in the in-

terpretation of which *Miller* v. *Heilbron* was rendered, was repealed at the same time the Act considered in *Burke* v. *Badlam* was enacted. (Stats. 1881, p. 56.)

*Miller* v. *Heilbron is not, therefore, on this point, an interpretation of any statute now in existence in this State, or under the authority of which either competing moneyed capital or national bank stock is being assessed.* It is the attempted interpretation of a statute which was repealed twenty years ago. *Burke* v. *Badlam,* on the contrary, is the interpretation of a statute which was then, has ever since been, and is now, a substantive law of this State.

*Miller* v. *Heilbron* throws no light on any existing law of this State, and cannot be said to be in conflict with *Burke* v. *Badlam,* which contains an exposition of existing and different laws.

In addition thereto, *Burke* v. *Badlam* is the expressed views of Justices Ross, Sharpstein, McKee, Thornton, McKinstry, and Myrick, with Morrison, C. J., concurring on a different point, while *Miller* v. *Heilbron,* if in point at all upon this question, is the views only of McKinstry, Thornton, and Sharpstein. The views of these Justices in Banc are not controlling, and the judgment must have failed of affirmance had not Justice Ross concurred therein upon another point mentioned in the opinion of Justice McKinstry. Mr. Justice Ross did not concur in the views expressed by Justice McKinstry so far as there was any possible conflict between those views and those expressed in *Burke* v. *Badlam.*

But whatever doubt may have existed as to the influence of the minority opinion in *Miller* v. *Heilbron,* on the decision of the Court in *Burke* v. *Badlam,* has been definitely removed by the ruling of the Supreme Court of California in *Bank of California* v. *San Francisco,* 142 Cal. 276, 285, in reviewing and affirming the ruling in *Burke* v. *Badlam.* The Court says:

"It was held that the language of the Constitution "clearly forbade double taxation; that the Legislature "had the right thereunder to say that all the property "of the corporation should be assessed to the corpora- "tion, and the same property should not again be as- "sessed for the same tax; that the 'property' of the "corporation included its franchise and everything else "evidenced by the certificates of stock; that while the "share of each stockholder was undoubtedly property, "it was an interest in the very property held by the "corporation and nothing more; and that when all the "property of the corporation, including its franchise, "was assessed, which it was to be presumed would be "done by the assessor in obedience to the requirements "of the law, any for the assessment of the shares to the "individual stockholders would be double taxation." (*People* v. *Badlam,* 57 Cal. 594.)

The rule announced in *Burke* v. *Badlam* must, therefore, be considered the rule of assessment in this State of the property and shares of stock of California corporations.

It follows that there is an equivalency, under our revenue system, between the assessment of the corporate property and the assessment of the stock; that the taxa-

tion of the corporate property is the taxation of the stock, and that the taxation of both the corporate property and the stock would be the taxation of the same property twice, and double taxation.

The taxation of all the corporate property being equivalent—the same as—the taxation of all the shares of stock, no stock of California corporations escapes taxation. The contention that there is a discrimination against national banks because the shares of stock of State banks is not taxed is, therefore, based upon a falsehood in law and in fact.

It is the holding in the Owensboro case that the taxation of the property of a national bank, including its franchise, is not the same as the taxation of the shares of stock of such bank. It is the holding that the Act of Congress allows the latter and forbids the former. It is the holding that the law of Kentucky, assuming to place a tax upon the property of the bank, and not upon its shares, is void for that reason. But it was not held therein, nor could it have been, that the taxation of all the property of a State bank may not be the same as the taxation of the stock of such bank.

In the language of Mr. Justice Miller, speaking for the Court in *Davenport Bank* v. *Davenport,* 123 U. S. 85:

"It has never been held by this Court that the States "should abandon systems of taxation of their own "banks, or of money in the hands of other corporations, "which they may think the most wise and efficient "modes of taxing their own corporate organizations,

" in order to make that taxation conform to the system " of taxing the national banks upon these shares of their " stock in the hands of their owners. All that has ever " been held to be necessary is, that the system of State " taxation of its own citizens, of its own banks, and of " its own corporations, shall not work a discrimination " unfavorable to the holders of the shares of the na- " tional banks. Nor does the Act of Congress require " anything more than this; neither its language nor its " purpose can be construed to go any farther. Within " these limits, the manner of assessing and collecting " all taxes by the States is uncontrolled by Act of Con- " gress."

*Davenport Bank* v. *Davenport,* 123 U. S. 85, is a case in which the contention was advanced that a valid assessment of national bank stock is possible only when a similar assessment is made of State bank stock. Justice Miller states the contention thus:

"The proposition of counsel seems to be, that the " capital of savings banks can be taxed by the State in " no other way than by an assessment upon the shares " of that capital held by individuals, because, under the " Act, the capital of the national banks can only be " taxed in that way. It is strongly urged that in no " other mode than by taxing the stockholders of each " and all the banks can a perfect equality of taxation " be obtained."

And it is held that the State is not required to abandon its own system of taxing the capital of corporations instead of their stock in order to affect taxation of national bank stock.

This case was in line with *Mercantile Bank* v. *New York,* 121 U. S. 138-160, wherein it was held that a tax levied upon the capital and franchise of State trust companies and savings banks will satisfy the requirements of the Act of Congress, notwithstanding the stock of such corporations is not directly taxed.

See, also:

*Palmer* v. *McMahon,* 133 U. S. 660;
*Bank of Redemption* v. *Boston,* 125 U. S. 60.

These cases are cited and approved by Mr. Justice White, in *Owensboro National Bank* v. *Owensboro.* They are cited for the purpose of pointing the distinction between that class of cases in which it is held *that the power conferred by Congress does not admit of the taxation of corporate property of national banks directly,* and that class of cases which hold that *there is no discrimination against national bank stock when the corporate property of State banks is taxed instead of the shares of stock of such banks.*

When, therefore, it is established, as it is in this State, that all the corporate property of State corporations is taxed, and that, under this tax system, the taxation of such property is the equivalent of the taxation of all the property of such corporations, it necessarily follows that there is no discrimination against national bank shares under a law which places the tax upon such shares.

**Equivalency in Fact.**

That there is an equivalency in fact, as well as in law, is demonstrated by the following statement. Through this statement a comparison is presented by the hypothetic assessment of the assets of the San Francisco National Bank, appellant, as a State bank. The figures are taken from the agreed facts.

ASSETS.

| | |
|---|---|
| 1. Loans and discounts | $1,382,330 39 |
| 2. Overdrafts | 4,293 26 |
| 3. United States bonds | 50,000 00 |
| 4. Premiums on United States bonds | 4,800 00 |
| 5. Cash on hand and due from banks | 390,915 13 |
| 6. Redemption fund (5 %) | 2,250 00 |
| Total assets | $1,840,038 78 |

LIABILITIES.

| | |
|---|---|
| 8. Capital stock paid up | $ 500,000 00 |
| 9. Undivided profits | 81,911 32 |
| 10. Deposits | 1,258,127 46 |
| Total liabilities | $1,840,038 78 |

ASSESSED AS A STATE BANK.

| | |
|---|---|
| Solvent credits, item 1 | $1,382,330 39 |
| Solvent credits, item 6 | 2,250 00 |
| Solvent credits, item 2 | 4,293 26 |
| Total solvent credits | $1,388,873 65 |
| *Less* debts due residents, item 10 | 1,258,127 46 |
| Assessable balance | $ 130,746 19 |
| Cash on hand, item 5 | 390,915 13 |
| Franchise (nominal) | 10,000 00 |
| Total assessment | $ 531,661 32 |

Or $106.33 a share.

ASSESSED AS A NATIONAL BANK.

| | |
|---|---|
| Capital paid in, item 8 | $ 500,000 00 |
| Undivided profit, item 9 | 81,911 32 |
| Total book value of stock | $ 581,911 32 |
| Or $116.38 per share. | |
| Less exemption— | |
| United States bonds, item 3 | $ 50,000 00 |
| Premium, item 4 | 4,800 00 |
| Total exemption | $ 54,800 00 |
| Assessment | $ 527,111 32 |
| Net assessment, $105.32 a share. | |
| Actually assessed at $104.36 a share, or | $ 521,000 00 |
| Balance in favor of assessment as a National Bank | $ 4,550 00 |

Thus it is made to appear that the practical application of the revenue laws of California to the assets of a National Bank in the assessment of such assets as if held by a State Bank would result in a discrimination in favor of and not against the National Bank.

The Circuit Court of Appeals in *Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 51, correctly applies the law on this series of contentions as follows:

"We are unable to see that, under the system of "assessment provided for in the California statute, "shares in national banking associations are valued "higher in proportion to their real value than moneyed "or competing capital of local banking corporations. "The mode of assessing such shares directly to the "owners thereof is certainly different from the indirect "method of assessing the interest of stockholders of

"local banking corporations in the property of such "corporations; but, under the statute as we interpret it, "all property which, if owned by a local banking cor- "poration or citizen of the State, would be exempt "from taxation under the State law, is, when owned by "a national banking association, to be deducted from "the total value of its shares in ascertaining the value "of such shares for the purpose of assessment. Under "this mode of proceeding no greater burden of taxa- "tion is imposed upon capital invested in national "banking associations than is placed upon competing "moneyed capital in the hands of individual citizens "or local banking corporations; and, this being so, "there is no conflict between the statute of the State "and section 5219 of the Revised Statutes (U. S. "Comp. Stats. 1901, p. 3502)."

At complainant's request there was inserted in the Statement of Agreed Facts upon which this matter was heard and determined below, a tabulation of the resources of the Bank of California and a list of the valuations at which the properties of said bank were assessed for purposes of taxation. From these respective lists it appears that the properties of the Bank of California were valued by the assessor at less than their actual value. We are aware of no rule of law or decided case through which it has been declared that an assessment of particular property can be avoided by a showing that certain other property has been undervalued. If the assessor, in the assessment of the property of the Bank of California, has undervalued that property in disregard of the requirements of the Con-

stitution and statutes of California directing him to assess it "at its full cash value" (sec. 3627, Pol. Code of California), that fact will constitute no defense to the collection of a tax on property which has been assessed "at its full cash value." The revenue laws of the State require the assessment of all property "at its full cash value" without discrimination. As we have seen, they require the assessment of the franchises of local banking corporations at a value ascertained in such a manner as will make the aggregate value of the property and franchise of such corporations equivalent to the aggregate market value of their shares of stock.

*Bank of California* v. *San Francisco,* 142 Cal. 276;

*Burke* v. *Badlam,* 57 Cal. 594.

If these laws are impartially administered no discrimination can result against national banking associations through the direct taxation of their shares. As this Court has repeatedly affirmed:

"Absolute equality and uniformity are seldom, if "ever, attainable; the diversity of human judgments, "and the uncertainty attending the human evidence, "preclude the possibility of its attainment. Intelligent "men differ as to the value of most common things be-"fore them—of animals, houses and lands in constant "use. The most that can be expected from wise legis-"lation is an approximation to the desirable end; and "the requirement of equality and uniformity found in "the Constitutions of some of the States is complied

"with when designed and manifest departures from "the rule are avoided."

*Stanley* v. *Supervisors,* 121 U. S. 550;
*Bank* v. *Kimball,* 103 U. S. 722;
*Supervisors* v. *Stanley,* 105 U. S. 305;
*Bank* v. *Perea,* 147 U. S. 67.

It is not asserted that any designed departure was made by the Assessor from the rule prescribed by the statute in his estimate of the value of the properties of the Bank of California. Neither is it alleged or proved that any general rule of conduct was adopted by him in accordance with which he has designedly and intentionally undervalued other competing moneyed capital. And the fact that he may have done so in the single instance of the Bank of California cannot be considered sufficient evidence of an unlawful discrimination. It is not alleged that any such discrimination was practiced by the Assessor or that any such discrimination exists other than such as, in appellant's view, must result from the operation of the law. That no discrimination was intended or is countenanced by the statute of California we believe is demonstrated by the Circuit Court of Appeals in *Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 57, and by the authorities cited in this brief.

"Mere inequalities in taxation will not vitiate a tax, "if they are accidental and unintentional. They must "occur under any system of taxation, and especially "under that in force in this State in which every civil

" district and ward has its own assessor. There will, " of necessity, be many instances in which property will " be assessed at more than its value, and more, perhaps, " at which it will be assessed at less than its value. " These errors and discrepancies will not vitiate the " tax. They are inevitable."

*Railway Co.* v. *Guenther,* 19 Fed. Rep. 302; *Cummings* v. *Bank,* 101 U. S. 157.

## II.

### Deductions of "Property Exempt by Law."

It was considered possible to assess the stock of national banks without an enabling act, on the theory that the property of such institutions, other than real estate, was not taxable. The attempt was made in *McHenry* v. *Downer,* 116 Cal. 20, and the Supreme Court of the State held that, in the absence of legislation designed to accomplish the assessment of national bank stock, no such assessment could be made. It held further that there was a discrimination against national bank stock, in an assessment of that stock when the corporate property of State corporations was assessed, and not the stock. In short, under the laws of the State, as they then existed, there was not an equivalency between the assessment of the stock of national banks and the assessment of the corporate property of State corporations. It was not questioned by the Court, however, but that such equivalency could be made to exist. It was held that a discrimination was possible against national

banks, because in the estimation of the value of its shares no deduction was allowed on account of United States bonds and other non-taxable securities, which were not assessed when owned by State corporations.

The point may be illustrated thus: A State bank owns $1,000,000 worth of United States bonds and bonds of *quasi* public corporations, which are not taxable. Its entire corporate property, including such bonds and excluding its franchise, is valued at $5,000,000. The market value of its stock aggregates $6,000,000. Its franchise is valued, therefore at $1,000,000. It will be assessed, therefore, for $1,000,000 on its franchise and $5,000,000 tangible property, less the non-assessable bonds, worth $1,000,000. Its entire assessment, therefore, will be $5,000,000.

Now, in the case of a national bank owning similar property, under the law as it existed when *McHenry* v. *Downer, supra,* was decided, no deduction from the value of its property, which would be used in estimating the value of its shares, would be allowed on account of United States bonds. As had been decided in *Van Allen* v. *Assessors,* 3 Wall. 573, and kindred cases, such bonds should be included in the valuation of such stock. This was the result: The stockholders of a national bank holding $1,000,000 in United States bonds, the stock of which had an aggregate market value of $6,000,000, would be assessed for $6,000,000, less the value of the bank's real estate only. Here, then, there would be a discrimination against such stockholders in the assessment of the United States bonds held by the

bank and the exemption of such bonds, when held by a State bank.

In the adoption of the Act of March 14, 1899, however, the Legislature has made provisions whereby this discrimination is removed, by allowing the same exemptions to the national banks as have been enjoyed by State banks. It is therein provided:

"In making such assessment to each stockholder, " there shall be deducted from the value of his shares " of stock such sum as in the same proportion to such " value as the total value of its real estate and property " exempt by law from taxation bears to the whole value " of all the shares of capital stock in said national " bank."

The Assessor is authorized and required, therefore, to deduct from the value of the share of stock, such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares. This the Assessor has done in this case. The method pursued will be found set forth in appellant's bill. It appears therefrom that the Assessor permitted a deduction on account of United States bonds, deposited to secure circulation, on account of United States bonds on hand, and on account of stocks and bonds of California corporations exempt under *Germania Trust Co.* v. *S. F.*, 128 Cal. 589. The total deduction made was divided by 30,000, the number of shares issued by appellant. This sum was deducted from the market value of appellant's stock, and the balance was assessed as the value of each share.

Those properties, therefore, which are treated as exempt in the assessment of the properties of State banks, are also treated as exempt in an estimation of the value of the shares of national banks. Absolute equality is maintained thereby, and any possible discrimination on account of such exemptions is avoided.

Solicitor for appellant seeks to give this provision in the Act of 1899 such an interpretation as would entirely nullify and defeat its purpose. The deduction allowed on account of "property exempt by law," he would have the Court so interpret as to require a deduction of all the properties of the national bank, thereby leaving no value in the share to be assessed. Such a construction would lead to a manifest absurdity. Such a construction would create a contradiction in terms, requiring the assessment of the stock, and providing a means for ascertaining its value, which would relieve it entirely from such assessment. No such intent can be attributed to any Legislature in the presence of any possible construction which will give effect to the language used. Where a statute is fairly susceptible of two constructions—one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense and wise policy—the former should be rejected and the latter adopted.

*In re Mitchell,* 120 Cal. 384-386;
*Jacobs* v. *Supervisors,* 100 Cal. 127;
Sedgwick on Stat. and Const. Law, 312.

When, therefore, it becomes manifest, from a review of the revenue laws of California, as construed by her Courts, that the deductions to be allowed, under this section of the Act, were to be so allowed for the purpose of avoiding a possible discrimination against national banks, it is fair to consider the exemptions permitted State banks in order to determine what exemptions are intended to be allowed national bank stockholders. When the purpose and intent of the Act is kept in mind, no difficulty is experienced in giving to this provision a rational and correct interpretation.

Nor is appellant's solicitor correct in the assumption that all the property of national banks is exempt from taxation, except their real estate. It is undoubtedly true that direct taxation of the property of a national bank, other than its real estate, is not permissible. But it does not follow that such property cannot be taxed for that reason. On the contrary, Congress has seen fit to permit the taxation of such property through the medium of the shares. In the valuation of the shares each and every element of property possessed by the national bank is to be considered, including United States bonds. The property of such banks is not exempt by law, therefore, from taxation. The Act of 1899 has manifest reference to such property as is exempt when held by State banks, and such property may include United States bonds and stocks and bonds of California corporations. By the deduction of such property from the property assessed to State banks, and

from the value of the shares of national banks, absolute equality is created in the taxation of both.

*Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 57.

It is thus evident both by the statutes and decisions of this State, that the system of taxation on its face works no discrimination against the national bank shareholders, and that it was the thought and intent of the State Legislature that the taxation of the property and the taxation of the shares was one and the same.

The purpose of this method of taxation was to avoid what the Supreme Court of the State had declared to be double taxation. And in the case of *Hepburn* v. *School Directors,* 23 Wall. 480, it is held that the exemption of all mortgages, judgments, recognizances, and monies owing upon articles of agreement for sale of real estate from taxation to prevent a double burden, by the taxation both of the property and the secured debt was a justifiable exemption and did not discriminate against shareholders of national bank stock.

In conclusion, it may not be improper to say that the Act of March 14, 1899, marks the last attempt on the part of the State of California to avail itself of the permission given by the Congress to the States to subject the shares of national banking associations to their just share of the burdens of taxation. Several previous attempts to accomplish this to the satisfaction of all legal limitations have been made without success. The present law we confidently believe meets all requirements

and must be considered, as in fact it is, a conscientious attempt to accord to the holders of national bank stock the full measure of protection to which they are entitled. Certainly the Act bears upon its face every indication of such a purpose, and its administration in harmony with the revenue laws of the State can only lead to an indiscriminate taxation of all such property. The judgment of the Circuit Court of Appeals was reached after full argument and mature consideration, and we respectfully contend should be affirmed.

PERCY V. LONG,
City Attorney,
Solicitor for Appellee.

WILLIAM I. BROBECK,
Assistant City Attorney,
Of Counsel.

# In the Supreme Court of the United States

**OCTOBER TERM, 1904.**

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SAN FRANCISCO NATIONAL BANK,
*Appellant,*

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA,
*Appellee.*

No. 44.

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## PETITION FOR REHEARING.

*To the Supreme Court of the United States:*

Your petitioner, as Assessor of the City and County of San Francisco, State of California, appellee, respectfully prays for an order directing a re-argument of the above-entitled cause, and as grounds therefor specifies:

First: That said decision is predicated upon a misinterpretation of the statutes and decisions of California, and denies to that State, under such misinterpretation, the exercise of a material fact of its sovereign power of taxation;

Second: That said decision will have the effect not only of relieving from taxation the shares of stock of national banking associations within her borders, but of unsettling and denying a rule of assessment of the shares of stock of her own corporations recognized, acted upon and sustained by her courts for over thirty years;

Third: That the issues upon which this case was decided are not within the pleadings and were not considered by the Court below as such, as appears from the decision of the Circuit Court of Appeals, given in the companion case of *Nevada National Bank* vs. *Dodge,* 119 Fed. Rep., 57, and by the argument of solicitors for appellant;

Fourth: That the appellee believes, and is so advised by his counsel, that a further consideration of this case and of the arguments which will be advanced in support of the judgment of the Circuit Courts will lead this Honorable Court to a decision in favor of the appellee;

Fifth: That appellant was without ground for complaint, inasmuch as its stockholders were taxed only upon the actual value of its tangible property, whereas the State banks and other moneyed corporations were taxed in excess thereof;

Sixth: That this Honorable Court, sitting in Equity, has erroneously assumed jurisdiction of a cause, cognizable only at law, and has erroneously issued an injunction to restrain the collection of a tax

on the sole ground of its illegality, contrary to equity and the precedents of this Court.

And your petitioner respectfully asks for an attentive, individual consideration of the argument following, in which an attempt is made to more fully state and to support the grounds above mentioned; and he further prays that the above-entitled cause be set down for re-argument before this Court upon some day by it to be appointed.

And as in duty bound will ever pray.

PERCY V. LONG,
W. I. BROBECK,
Counsel for Appellee.

We certify that, in our opinion, the foregoing petition for a rehearing is well founded.

PERCY V. LONG,
W. I. BROBECK,
Counsel for Appellee.

**IN THE SUPREME COURT OF THE UNITED STATES.**

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THE SAN FRANCISCO NATIONAL BANK,
*Appellant,*

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO,
*Appellee.*

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## ARGUMENT ON PETITION FOR REHEARING.

A case of unusual importance to the proper exercise by a sovereign State of the all-essential power of taxation has been erroneously decided. "A grievous "wrong is done to the State of California." Confident in the belief that she had done all and more than the most exacting could require in affording protection to the National Banking Associations within her taxing jurisdiction, through one of her assessing officers, the State of California submitted to the final determination of this Supreme Court the controlling question whether, under her constitution and statutes, as expressly declared and interpreted by her own and

the Circuit Courts of the United States, she had not dealt fairly with such associations. The answer given by this Court not only does the State "a grievous wrong", through the misconstruction of her motives and of her laws, but it has had the unexpected and unnecessarily wrongful effect of unsettling a principle under which, for twenty years, she has taxed her own corporations of all classes, and cast doubt upon a heretofore accepted and acknowledged power necessary to that end.

We are advised of the necessity which supports the practice obtaining in this Court of turning an unwilling ear to petitions for a second consideration of a cause already considered and determined. So ample are the opportunities afforded, under our liberal methods of procedure, for the presentation, in the first instance, of a cause on appeal, that occasions must be rare in which a request for a rehearing should be presented. Such instances do occur, however, in which it would be a positive denial of justice, not only to the parties litigant, but to others, were the original decision permitted to stand as the rule of the case and the law of the land; and this Court has recognized the possibility of being itself in error and of correcting the same by making provision in its rules whereby an opportunity is afforded the unsuccessful party of pointing out wherein the error consists and requesting its correction. And in no event can the considerations moving to that end be more forcefully

suggested than in one of that great class of cases in which the taxing power of a sovereign State is being denied, not only in relation to the governmental agencies engaged in competitive business within her boundaries, but, a more serious consideration, by the assumption by this Court of the interpretation of the tax laws of the State in their relation to her domestic affairs, far from all federal concern, and where such assumption results in an actual misinterpretation of such laws to her manifest injury.

It has been the law of California, controlling the taxation of corporate property and shares of stock subject to her taxing power, since 1872, (with the exception of a single year, from March 22, 1880, [Amendment to Codes, 1880, p. 10] to March 7, 1881, [Stats. 1881, p. 59]), that such taxation should be directed against the corporate property, including the franchise and all other elements entering into and constituting the value of such shares. Since *Burke* vs. *Badlam,* 57 Cal., 594, decided January, 1881, no one has questioned that rule of assessment, with the single exception of the Bank of California in *Bank of California* vs. *San Francisco,* 142 Cal., 246, and in that instance unsuccessfully. It was, therefore, with a sense of profound surprise, that the ruling of this Court was discovered to be, what has been unknown and unrecognized in California for over forty years, that is, that the State of of California had actually omitted to make provision for the taxa-

tion of the shares of stock of its corporations at their full value. It must be admitted that, if true, this reveals a most remarkable condition of affairs. That such a large body of taxable wealth should be relieved from taxation is a reflection upon the lawgivers of a State that has addressed itself with some attention to this most important subject. Such a condition may be described as so remarkable as to leave some doubt, even after the close analysis given the subject by a majority opinion of this Court, as to whether it is legally true. Imbued as we are with the knowledge of the workings of that system and its results, we are constrained to deny that the tax laws of California admit of any such interpretation, or that the Supreme Court of that State has been guilty of attributing any such construction to them. Whatever doubt may have arisen from the reasoning of the majority opinion of this Court has been entirely removed by an examination of the conclusions stated in the minority opinion, familiar as we are with the tax system of California and its operation.

It is for the purpose, therefore, of sustaining not only the power of the State of California to tax the shares of stock of National Banking Associations in the manner now provided, but, more important still, of maintaining the integrity of the system of taxation of her own corporations, that we ask a further consideration of this cause. With this two-fold purpose in view, we proceed to an analysis of the reasons

which have prompted the majority of this Court to reverse the judgment.

## I.

### STATING THE QUESTION.

Although the Court is found to be divided, five Associate Justices concurring in the majority opinion, and the Chief Justice and three Associate Justices concurring in the minority views of the Court, all unite in the view that the many contentions advanced by the Appellant Bank are "without merit" with a single exception. It is the cardinal error of the majority opinion that the laws of the State of California do not require, in the assessment and taxation of the shares of stock of California corporations, that all the elements of value which combined constitute the market value of such stock, should be assessed and taxed to the corporation.

With respect to the contentions advanced against the validity of the Act of 1899, under which the assessment was made, the majority opinion says:

> "Many contentions were argued at bar involving the assertion that the State law was invalid because of deductions of debts or exempt property which it was asserted, the law allows to state banks and other moneyed corporations on an assessment of their property and does not allow holders of shares of stock in natonal banks. Most of these contentions are in effect disposed of by the consideration which we have given to the proposition that the State law was void simply because it established different methods of taxation as to the two classes of corpora-

tions. In so far as the contentions are not in fact disposed of by our conclusions on that subject, we content ourself with saying that we think all such propositions were rightly decided by the court below to be without merit for the reasons expressed in the opinion delivered by that court in the *Nevada Bank case*, to which the Court referred and upon which it placed its ruling."

*Nevada National Bank* vs. *Dodge*, 119 Fed., 57.

And this view is confirmed by the minority opinion.

Every contention, therefore, made by counsel for the Assessor Appellee, in their brief in this case has been sustained, save one.

The majority opinion maintains that this single exception is within the issues of the case, while the minority view of the Court is that it is without such issues.

On behalf of Appellant Bank it was insisted that no taxation of the shares of stock of a national banking association was possible in California until provision had been made by statute for the direct taxation of the shares of stock of competing California corporations. On the part of Appellee Assessor, it was asserted in reply that the State was not required to change her system of taxation of shares of her own corporations in order to effect the taxation of national bank stock, that the taxation of all the property of corporations organized under her laws was the equivalent of the taxation of the shares of such

corporations, and satisfied the requirements of the Acts of Congress (Sec. 5219, Rev. Stats.) that national bank stock should not be assessed at a greater rate than other competing moneyed capital. This Court unanimously so held. Affirming *Davenport National Bank* vs. *Board of Equalization,* 123 U. S., 83, it was again announced that Section 5219 of the Revised Statutes "did not require the States, in taxing their own corporations, to conform to the system of taxing national banks upon the shares of their stock in the hands of their owners."

In this view the majority opinion concedes that: "No conflict necessarily arises between the Act of Congress and the State law, solely because the latter provides one method for taxation of State banks and other moneyed corporations and another method for national banks"; and it is held to follow that the contention that the State law for that reason is repugnant to the Act of Congress is without merit." The author of the majority opinion then proceeds to consider whether the California method for the taxation of domestic stock requires that there should be taken into account the good will of the corporation as elements in fixing the value of the property of the corporation represented in the market value of its stock.

That the good will, dividend or profit-earning power of a corporation is assessed under the California system was insisted by counsel for appellee and

the proposition as stated by counsel for appellee and quoted in the majority opinion, was stated thus:

> "Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of the corporation is greatly in excess of the value of its property, other than its franchise. This fact was called to the attention of the State Court, which recognized the force of this suggestion, and held the Constitution and laws of the State require the assessment and taxation of the franchise of the corporation, and that its value, for the purpose of such assessment and taxation, was properly ascertained by deducting from the market value of its stock the value of its corporate property and assessing the remainder as franchise."

The author of the majority opinion, commenting on this view, makes the following concession:

> "It may be conceded that if the statutes have been interpreted by the Supreme Court of the State as thus asserted, and that as so interpreted they have been applied by the assessing officers, there would be an end to the discriminations which we have seen arise from the consideration of the result of the statutes when not so interpreted."

And the question in its last analysis, is declared to be: "Do the decisions of the Supreme Court of "California, as contended, place the positive duty on "the assessor of including in an assessment of the "franchises of State corporations, all the elements of "value which form part of the market or selling "value of shares of stock?"

Accepting, for the time, the view of the majority that this is the question to be determined, we pass to a discussion of that question.

## II.

### WHAT THE LAW OF CALIFORNIA REQUIRES TO BE TAXED.

The State of California, in the enforcement of her tax laws, has met with considerable difficulty. The original Constitution for a State government was proclaimed December 20, 1849, and, in line with the provisions found in the constitutions of most of the States, the simple provision is found therein requiring taxation to be "equal and uniform throughout the State," and that "all property in this State shall "be taxed in proportion to its value to be ascer- "tained as directed by law." (Sec. 13, Art. XI, Constitution of California, 1849.) No definition of what constituted property was attempted.

In interpretation of this clause, the State Supreme Court, in *People* vs. *McCreery,* 34 Cal., 455; after quoting the language, said: "Construction or inter- "pretation can scarcely make the meaning of the "words more apparent, for there is no word in the "clause of ambiguous or doubtful import."

*People* vs. *Eddy,* 43 Cal., 331.

But it was afterwards held, in a case that was thereafter described as being without authority at home or respect abroad, that credits were not property and could not be taxed. *(People* vs. *Hibernia S. & L. Soc.,* 51 Cal., 244, and *Savings and Loan Soc.* vs. *Austin,* 46 Cal., 495.) Few cases have ex-

cited so much criticism in California and elsewhere. (*Burrough on Taxation,* p. 50; *Lamar* vs. *Palmer,* 18 Fla., 149-150; *New Orleans* vs. *Insurance Company,* 30 La. Am., 877; *State* vs. *Carson City Bank,* 17 Nev., 149.) and to that remarkable ruling may be ascribed the fact that soon thereafter, on May 7, 1879, a new Constitution, having been ratified by the people, was proclaimed. In substitution for the modest two or three sentences in the Constitution of 1849 relating to taxation, there was inserted in the Constitution of 1879 an entire article devoted to "Revenue and Taxation" and numbered "XIII," Section I of which article assumes to determine what property is liable to taxation. It reads:

> "All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership; provided, that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the Unitetd States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this State."

Following the precedent in such matters, it declares "all property in the State, not exempt under " the laws of the United States, shall be taxed in " proportion to its value, to be ascertained as provid-

"ed by law." The fact that the Constitution requires that "all property shall be taxed" is sufficient, in the view of most Courts, to subject every class and kind of property within the taxing jurisdiction of the State and not expressly exempt, to its just share of the burdens of government. Indeed, most State Constitutions go no further; and the Courts have been left in no doubt as to the meaning of so unequivocal a command. A lesson had been learned by the people of California, however, in their failure to specifically describe what properties should be taxed, and the influence of that teaching was felt not only in the convening of the convention and in the enlargement of the provisions of the State Constitution relating to revenue and taxation, but in the addition of a definition of what should thereafter be regarded as "property" for the purposes of revenue and taxation. Section 1 of Article XIII of the Constitution of 1879 accordingly provides:

> "The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, *stocks*, dues, *franchises*, and *all the matters and things, real, personal and mixed, capable of private ownership.*"

A more comprehensive definition could not be drawn. Laboring under the influence of a recent ruling, which had the effect of exempting from taxation a great portion of the credit wealth of the State, the framers of the Constitution exerted their utmost endeavors to include within the definition of taxable

property all "matters and things, real, personal and mixed, capable of private ownership." It may not be doubted that one of the primary purposes designed to be accomplished thereby was to withdraw from the uncertainty of judicial construction and interpretation, all questions as to what was intended to be taxed, and to subject all property to taxation. If possible the requirement that all property should be taxed, which was not expressly exempted, was made more emphatic by an express enumeration, in the same section, of such properties as were to be exempt. It was provided that "property used for free public "libraries and free museums, growing crops, prop- "erty used exclusively for public schools, and such "as may belong to the United States, this State, or to "any county or municipal corporation within this "State, shall be exempt from taxation." (Sec. 1, Art. XIII, Const. 1879.)

Not only, therefore, does the constitution command the taxation of all property, as that term is defined therein, but it assumes itself to specify such property, and such property *only*, as is exempt therefrom. Nothing is left to judicial construction. Nothing remains for the play of legislative discretion.

As the Supreme Court of California said, in *Mackay* vs. *San Francisco*, 113 Cal., 397, 401, in considering the taxability of bonds:

"The Constitution not only provides that all 'property' shall be taxed, but defines the word 'property' and expressly includes *bonds* in that definition, thus placing it beyond the power of the Legislature or the Courts to say that bonds are not property within the meaning and intent of the Constitution."

The same is true of "stocks." The Constitution has expressly declared "stocks" to be taxable in California and has thereby withdrawn from legislative or judicial consideration the question whether stocks shall be taxed. Stocks are required to be taxed "in " proporition to their value, to be ascertained as pro- " vided by law."

This portion of this section (Sec. 1, Art. XIII) of the Constitution is not self-executing.

*McHenry* vs. *Donner*, 116 Cal., 25.

And, as the majority opinion agrees:

"Carrying out the command to provide for the ascertainment of the value of property to be taxed, it was enacted (Political Code, Sec. 3627) that all taxable property shall be assessed 'at its full cash value,' and (Political Code, Sec. 3617) that the terms 'value' and 'full cash' means the amount at which the property would be taken in payment of a just debt due from a solvent debtor."

This is the "yard stick" by which the values of all properties are to be measured for taxation; the value of the corporate property; the value of shares of stock; as well as horses and chattels; *shares of stock in State banks as well as in national banks;* "all property."

*The law of California requires, therefore, that the*

*stock of corporations should be taxed "at its full cash "value, i. e., the amount at which it would be taken "in payment of a just debt due from a solvent "debtor."*

Such is the positive law of the State. The author of the majority opinion says: "In the argument at "bar no law of the State was referred to requiring "that the assessing officers in valuing the property "of a corporation should assess as property its good "will, its dividend-earning power, the confidence re- "posed in its officers, etc." All of the laws to which we have referred were called to the Court's attention and are referred to in the majority and minority opinions. And such laws make it the imperative duty of the assessing officer to assess all stock at its full cash value. The law imposing such a duty upon such officers appears to be too plain for misinterpretation.

*To repeat.*—The Constitution requires all stock to be taxed in proportion to its value, to be ascertained as provided by law. The law declares that such value is ascertained where the full cash value is ascertained, that is, the value at which the stock would be taken by a creditor in payment of a just debt due from a solvent debtor. The conclusion is irresistible that stock is required to be assessed in California at its full cash value. The majority opinion holds the true cash value to be the "market or selling value."

What escape is there from the conclusion that the Constitution and statutes of California make it imperative that stock should be assessed at its market value? There is none.

The shares of stock of national banking associations "shall be valued and assessed as is other property for taxation" (Pol. Code, Sec. 3809), which property includes shares of stock of State banking and other moneyed corporations.

Does any one suggest for a moment that the Legislature of California could constitutionally exempt, either directly or indirectly, the shares of stock of California corporations from assessment and taxation in proportion to their value? Certainly not. Does any one suppose for a moment that the Legislature of California could *partially* exempt the shares of stock of California corporations from taxation in proportion to their value? Certainly not.

Any statute attempting either a whole or a partial exemption of such stock, or any other property in California, would be so manifestly unconstitutional as to afford no assessing officer any excuse for obeying. The law no more countenances partial than total exemptions.

But, nothwithstanding these legal conclusions amount to a legal demonstration, the majority of this Court finds that such a partial exemption exists and is so far sanctioned by the law of California as to make a statute, conceded to be valid on its face, in-

valid in its operation. Let us see if this can be so. That it is so is attributed to but one thing, namely, that, in the assessment of the State of California corporations there is not included, as an element of value, the good will, dividend or profit-earning faculties of the corporation. If that be true, it can only be so on the ground that good will is not a property of the corporation, for no one can have the hardihood to maintain that the laws of California do not require the assessment of all the property of the corporation. That it is not a matter or thing, real, personal, or mixed, capable of private ownership. As the majority opinion concedes that the Constitution and statutes of California do require that all the property of a corporation be taxed, and that such a method of reaching the stock would satisfy the requirements of Section 5219 of the Revised Statutes, if all the elements of value were so assessed to the corporation, it may be of advantage to consider the method employed in reaching and taxing such value.

## III.

### ALL ELEMENTS ENTERING INTO AND CONSTITUTING THE VALUE OF STOCK OF CALIFORNIA CORPORATIONS IS TAXED, AND IS IMPERATIVELY REQUIRED TO BE TAXED, BY THE LAWS OF THAT STATE.

No doubt could exist on this subject in the mind of the author of the majority opinion, as in fact no doubt has ever existed in California, were it not for

the provisions of the law of California, under which the tax is imposed directly upon the property and other elements of value constituting the value of the stock of the corporation, and so but indirectly upon the stock.

The author of the majority opinion is in error in so far as he asserts that "Prior to 1881 shares of stock of all corporations were taxed." From the earliest time, it was provided in California that "the owner "or holder of stock in any incorporated company "liable to taxation on its capital, shall not be taxed as "an individual for such stock" (Sec. 7, Act of March 30, 1850, p. 135). The same Act, in Sec. 73 to 84 thereof, made provision for taxing the property of incorporated companies. Though variously amended and re-enacted (Stats. 1851, p. 153; Stats. 1853, p. 669; Stats. 1857, p. 1861) the law so remained without material change until the codification of the laws in 1872, and the adoption of such codification March 12th of that year, when section 7 of the Act of 1850 was inserted in the Political Code, numbered 3640 and made to read as follows:

> "The owner or holder of stock in any firm or corporation, the entire capital or property whereof is assessed, must not be assessed individually for his stock in such firm or corporation."

And in the succeeding section (3641), it was provided:

> "The property of every firm and corporation must be assessed in the county where the property is situate, and must be assessed in the name of the firm or corporation."

No further change in the law was attempted until March 22, 1880 (Amendments to the Codes, 1880, p. 10), when the Legislature of that year amended section 3640 of the Political Code, to read as follows:

> "Each person, firm, or corporation owning or having in his or its possession any of the shares of the capital stock of any corporation, association, or joint stock company, shall be assessed therefor. If the corporation, association, or joint stock company has its principal place of business in this State, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which its capital stock is divided. The owner or holder of capital stock in corporations, associations, and joint stock companies whose principal place of business is not within the State, must be individually assessed for such stock. Shareholders, in the statement required by section three thousand six hundred and twenty-nine of this Code, shall specify the number of shares of stock held by them, and the name of the corporation. The owners of shares of stock to be entitled to the deduction provided for in this section, must produce to the Assessor a certificate of the assessment of the property of the corporation, association, or joint stock company."

Even this amendment did not require the assessment of the shares of stock of California corporations directly and at their full value, but directed that the assessable value of each share of stock shall be ascertained by taking from the aggregate market value of such stock the value of all property assessed to the corporation, and dividing the remainder by the entire number of shares into which the capital stock is divided. That was but another way of getting at the franchise value as it entered into the

stock and was not a substantial departure from the method theretofor for thirty years obtaining in California.

An attempt was made to assess national bank stock under this amendment of 1880, but failed under the decision of the State Supreme Court in *Miller* vs. *Heilbron,* 58 Cal., 133, being declared void upon a premise which the opinion in this case finds to be untenable. Before *Miller* vs. *Heilbron* was decided, however, the Legislature of 1881 had convened, and an Act approved March 7 of that year, removed any doubt of the policy of the State in its treatment of the shares of its corporations for purposes of taxation, by repealing section 3540, as amended March 22, 1880, and by adding a new section to the Code, numbered 3608 (Stats. 1881, p. 56). The amendment of 1880 was in effect, therefore, less than a year, when it was entirely repealed, and 3608 was added to the Code in substitution for it. About 3608 there was nothing equivocal. It marched straight up to the constitutional requirements that stock should be taxed at its full cash value, *i. e.,* the value at which it would be accepted by a creditor in payment of a just debt due from a solvent debtor, and affirmatively declared that such stock possessed "no " intrinsic value over and above the actual value of " the property of the corporation which they stand " for and represent, and the assessment and taxation " of such shares and also of the corporate property

"would be double taxation. Therefore," declares the statute, "all property belonging to corporations "shall be assessed and taxed, but no assessment shall "be made of shares of stock, nor shall any holder "thereof be taxed therefor."

In the meantime, however, the people had, in May, 1879, ratified a new constitution, Section 1 of Article XIII of which, as we have seen, imposed taxation upon "all property in the State not exempt under the laws of the United States," and had so defined the word "property" as to include "stocks, "franchises, and all other matters and things, real, "personal, and mixed, capable of private owner- "ship." At the time this Constitution was ratified, Section 3627 of the Political Code commanded, "all property must be assessed at its full cash value," and by subdivision fourth of Section 3617 of the same Code, "full cash value" was defined to be "the amount at which the property would be ap- "praised if taken in payment of a just debt due from "a solvent debtor." Lest there should be any doubt whether the Legislature had provided by law for ascertaining the value of taxable property, Section 3617 was re-enacted in an amended form, at the first session of the Legislature following the ratification of the Constitution (Amendments to the Codes, 1880, pp. 5-6) to read as follows:

"Fifth. The true 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor,"

and so the law provides to-day.

When, therefore, the Constitution of 1879 commanded that all property, including stocks, should be "taxed in proportion to its value," that term had received a definition in the laws of the State in the light of which the term was advisedly used in that instrument. Such is the rule of construction generally recognized, (Sutherland, Statutory Construction, Sec. 253 and cases cited), and such is the rule applied by the Supreme Court of California to its Constitution (*Cameron* vs. *Kentfield,* 57 Cal., 550).

This constitutional provision must be held, therefore, to require the taxation of stock at its full cash value. It was so interpreted by the Legislature that met immediately thereafter (Amendments to the Codes, 1880, p. 56). It follows, as day follows night, that any statute attempting the exemption of stock from taxation at its full cash value, *although such attempted exemption might be but partial,* would be unconstitutional and void.

When, in this condition of the law, Section 3608 was added to the Political Code, in 1881 (Stats. 1881, p. 56), it was quite natural that some question should be raised as to the constitutionality of a provision which relieved stock from taxation directly and taxed it only indirectly. A case was prepared

to test the question. An original application was made to the State Supreme Court for a writ of mandate commanding and requiring the Assessor of San Francisco to assess to various holders of certificates of stock in various corporations the respective shares held by them. That the question might be thoroughly tested in all its bearings certificates of stock of the Nevada Bank of San Francisco (then a State bank), of the San Francisco Gas Light Company, of the Golden City Chemical Works, of the Selby Smelting and Lead Company, and of the Virginia and Gold Hill Water Company, were all included in the demand for their assessment. A greater variety of corporations it would be difficult to unite in one proceeding. The case was entitled *Burke* vs. *Badlam*, and there was called to its consideration the leading members of the California bar, including Senator F. G. Newlands, Creed Haymond, who had but recently revised and codified the laws of the State; Mr. Hall McAllister, to whose memory the bar of California has but recently erected an impressive memorial, and others less famous but scarcely less able. These gentlemen, bringing to the assistance of the Court the best that the bar boasted, took the unanimous position, in support of the Act, that it was constitutional because every element of value of the share was by law required to be taxed to the corporation; and that, as the Constitution did not permit double taxation, this satisfied its mandate that the

stock should be taxed at its full cash value. In the leading opinion, written by Mr. Justice Ross, now and for many years United States Circuit Judge for the Southern District of the Ninth Circuit, that interpretation is placed upon the Constitution and laws of California, which is now denied by the majority opinion of this Court, to wit:

> *"To assess all of the corporate property of the corporation,* and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same porperty twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each." (Italics are ours.)
>
> *Burke* vs. *Badlam,* 57 Cal., 601.

This was, of course, a substantial restatement of the provisions of Section 3608. What did the Court, and so the statute, mean by *"all the corporate property?"* After holding that it would be as much double taxation to tax shares of stock, as requested by plaintiff, as it would to tax all the property of a partnership to the firm and at the same time tax the same property to the individual members of the firm, the Court says: "In the case of corporations, take away " all of its property, which, it must be remembered, " includes its franchise, and the stockholder no " longer has the property. * * * In the case of " the corporations to which we have referred, " the Legislature has declared that all of the " property held by such corporation shall be assessed

" to them. It has not attempted to exempt any prop-
" erty from taxation not exempt by the Constitution
" itself, and of course could not do it if it had. It
" has only said that the property shall be assessed to
" the corporation, and shall not be again assessed for
" the same tax."

The Court recognized the fact that the law required "stock" to be taxed at its full cash value. From this requirement no escape existed. Stock could not be assessed at less than its full cash value. It could not be so assessed directly; it was equally true it could not be so assessed indirectly. Any attempt to do so would be unconstitutional. The full cash value, says this Court, is the market or selling value. To assess stock at its full cash value through an assessment of the property of the corporation was held by the Supreme Court of California in this case, not only to be possible but to be required by positive law.

That certificates of stock are merely muniments and evidence of the holder's title to a described share or interest in the property and franchise of the corporation has long been the recognized rule of decision in this Court.

*Bayley* vs. *Railroad Co.*, 22 Wall., 636.
*Miller* vs. *U. S.*, 11 Wall., 297.
*Deleman* vs. *R. R. Tax Case*, 18 Wall., 229.

"What," says the Court, "is the stock of a corporation but its property—consisting of its franchise and such other property as the corporation may own? Of what else does its stock

consist? If all this is taken away, what remains? *Obviously nothing.* When, therefore, all of the property of the corporation is assessed—*its franchise and all of its other property of every character*—then all of the stock of the corporation is assessed, and the mandate of the Constitution *is complied with.*" (The italics are ours.)

What is the mandate of the Constitution that is complied with—the mandate that stock shall be assessed in proportion to its "value," to wit: its "full cash value"?

All of the Justices, except Mr. Justice Morrison, concur. Mr. Justice McKinstry, following the lines of Mr. Justice Ross' reasoning, says:

"The Constitution declares the 'stocks' and 'franchises' shall be included in the word 'property' and that all property shall be taxed 'in proportion to its value.' But the Constitution does not require that stocks or franchises shall be *twice* taxed. When the aggregate value of all the shares of stock is taxed to the corporation, the real and personal property and the franchise is ordinarily included in the tax; certainly when the stock, franchise, and other property are taxed to the corporation, everything required by the Constitution to be taxed *is* taxed; and this whether one of these subjects of taxation includes the others or not. The statute provides that shares of stock shall not be assessed to the holders. *Why should they be if the 'property' which is assessed to the corporation includes the anticipated profits from the enjoyment of the franchise, and all other elements of value which go give value to the shares of stock?*" (Italics are ours.)

This is said in further explanation of the holding of Mr. Justice Ross, and defines the law of California to require that the profit-earning power and the good will, which must be included in "all other ele-

" ments of value which go to give value to the shares " of stock," should be assessed to the corporation. In view of that requirement of the California law, as held by the majority of the Court, he found it possible to concur in a judgment which relieved stock from direct assessment and taxation. Upon no other theory could the section of the Code be held constitutional. These elements of value were to be considered in valuing the franchise of the corporation, as this and other Courts have repeatedly held possible.

*Hamilton County* vs. *Massachusetts,* 6 Wall., 632-640.

*Home Ins. Co.* vs. *New York,* 134 U. S., 604-605.

*People* vs. *Roberts,* 154 N. Y., 101.

Wherever it was impossible to reach the property of the corporation, including its franchise, there could be no exemption of the stock of the corporation from direct assessment. In that case the stock was required to be assessed. The same Court so held in *San Francisco* vs. *Fry,* 63 Cal., 570, and *San Francisco* vs. *Flood,* 64 Cal., 507. In the latter case the Court reiterated the ruling that shares of stock were exempt from direct assessment only "where the en- " tire capital or property of the corporation, in " which the shares are owned, is assessed, and it does " not appear that the corporation or corporations, in

" which the shares here assessed were owned, were " assessed at all during the fiscal year for which the " assessment herein was made."

But there can be no doubt of the meaning of *Burke* vs. *Badlam*. It has stood for twenty years in California as an interpretation of the laws of that State, and has been accepted by both State and Federal Courts as holding to the doctrine stated. We are aware that the learned author of the majority opinion does not give us credit for having cited it to the point being discussed, and does himself ignore it from this point of view, but a casual reading of the brief for appellee will convince the Court of that error, and, on the oral argument, the case was so strongly relied upon as to suggest an inquiry from Mr. Justice Holmes as to its holding. Be that as it may, the case was before the Court and considered. Its true meaning had been doubted here for the first time. In *San Francisco* vs. *Mackay*, 10 Sawyer, 302; 22 Fed. Rep., 602, decided three years after *Burke* vs. *Badlam,* the view of appellee as to its significance and legal conclusions are sustained and applied. It was similarly interpreted by the Circuit Court of Appeals, in *Nevada National Bank* vs. *Dodge,* 119 Fed., 57. The Supreme Court of North Carolina, in *Railroad* vs. *Commissioners,* 91 N. C., 459, said of it:

"The decision rests upon the proposition that corporate property of every kind exposed to taxation is represented in the value

of the stock, and whether the tax be levied upon the one or the other, it is but *ad valorem* tax, and to levy it upon both at the same time would be to duplicate it, and thus disregard the restraints of the Constitution."

And in the Supreme Court of California, how has this case been regarded?

At the same time at which *Burke* vs. *Badlam* was decided, and while this subject was fresh in the minds of the Justices, an appeal reached them involving the validity of an assessment levied upon the franchise of the San Jose Gas Company, from the record in which it appeared, among other matters, "that the assessor assessed the franchise of plaintiff "at $130,000, in making which valuation he estimated the combined aggregate market value of the "shares of the capital stock of the corporation, held "and owned by the shareholders, at $240,000, and "from that aggregate deducted the combined aggregate value of all the taxable property of the corporation * * * and found the result $130,000, "and assessed the franchise at that sum." Injunction was sought to restrain the collection of the tax thereon in *San Jose Gas Co.* vs. *January,* 57 Cal., 614. Two grounds were stated in the opinion for affirmance of the judgment denying the writ, the second of which concerned the franchise tax. After holding a franchise to be property and assessable as such, the Court says:

"The method of assessment, and by whom, has to be and was provided for by law. Therefore, it does not rest with the

plaintiff or with the courts to determine that the franchise has no value. In a pecuniary sense, the value of franchises may be as various as the objects for which they exist, and the methods by which they are employed, and may change with every moment of time; but that franchises are property, and are to be taxed in some method in proportion to value, is a part of the paramount law of this State."

Of this case the majority opinion says: "The case "simply decided that where a part of a tax was as- "serted to be illegal and a part was admitted to be "valid, the duty existed to pay the confessedly legal "part to justify relief concerning the portion claim- "ed to be illegal." Such was undoubtedly one of the grounds stated for sustaining the judgment, and was sufficient in itself to do so, but another and a second ground was stated to the same purpose, as quoted above. That there may be more than one ground stated for the same conclusion without making either or both *obiter dictum* will hardly be disputed; and when two reasons are assigned for the same judgment this Court will not put us to an election as to which we may cite as the authoritative determination of the Court. To be put to an election of which one of two premises, either of which would be sufficient to sustain the conclusion of the Court, is *obiter*, would result in the conclusion being without any authoritative support.

Accepted, therefore, as an authoritative expression of the Supreme Court of California, in association, both in time of delivery and subject matter with

*Burke* vs. *Badlam,* there is no escape from the conclusion that the Supreme Court of that State intended to hold, and did actually declare, that the shares of stock of a corporation having property in California were assessed and taxed in an assessment and taxation of all the property of such corporation; that all the elements of value entering into the value of the shares of such corporations should be assessed and taxed to the corporation as its franchise, and that the value of such franchise, necessarily including such elements of value, was properly ascertained by deducting from the aggregate market value of its stock, the value of the tangible property. So obviously is this true, so true is it that in no other manner could the constitutional and statutory requirements that all stock shall be assessed at its full cash value be met and satisfied, that it is the wonder of California Courts and bar that this Court should ever have doubted their holdings thereon. And when that method is adopted, it is equally obvious that no element of value can possibly escape taxation. If any element of value did so escape, the law which permitted it would be unconstitutional and void.

That *San Jose Gas Co.* vs. *January,* was intended to be an authoritative holding on the second proposition discussed in the opinion is finally established by *S. V. W. W.* vs. *Schottler,* 62 Cal., 115, where it is cited with approval upon the question and that portion of the opinion is quoted.

But the holding in *S. V. W. W.* vs. *Schottler,* 62 Cal., 69-117, affords further proof of the intention of the Spureme Court of California to affirm the method adopted in *San Jose Gas Co.* vs. *January,* for reaching the value of a franchise. On page 117 of the opinion, the Court, after reviewing the laws of California controlling her assessing officers, says:

> "It appears from the record in this case that the Board of Supervisors, in the exercise of its power of equalization, assessed the franchise of the Water Works by taking the aggregate market value of the shares of stock in the company on the 7th day of March, 1881, and deducting therefrom the value of the real and personal property of the company, and held the difference to be the value of the franchise. The market value of the stock was shown to the Board by the testimony of *witnesses.* Such a mode of arriving at the value of the franchise appears to have been adopted by the Assessor in *San Jose Gas Co.* vs. *January,* 57 Cal., 614, and this mode was held to be within the powers vested in the Assessor. It was also impliedly approved as a correct mode in *Burke* vs. *Badlam,* above cited."

Advancing a step further in the consideration of this important question, the Court passes to a review of the changes effected in the revenue law of the State in the session of the Legislature of 1881, whereby Section 3640 of the Political Code was repealed, and 3608 was added, and, after setting forth in full, it says:

> "By this section (3640), which was repealed as above, it will be seen that the whole property of the corporation, including franchise and other assessed property, would have been taxed. This was by the operation of the section to have been brought about by taxing the shares to each owner of shares in the manner indicated by its provisions. But by declaring, as was done

in section 3608, that shares of stock were not to be taxed because they possessed no intrinsic value over and above the value of the property of the corporation which they stand for and represent, and as taxing of the shares and property both would be double taxation, and therefore the shares should not be assessed, but the property should, no doubt it was their intention to tax everything in the shape of property owned by the corporation; *that everything entering into and giving value to the shares should be taxed. It cannot be doubted that the Legislature, in acting on the subject of revenue and taxation in the session of 1881, did not intend to leave the system in relation to so important a matter in such a shape, that so large an amount of property as indicated by the difference between the market value of the shares of corporations and the value of the tangible property of such corporations should escape taxation. To come to any other conclusion, would be to impute to that body a most culpable dereliction of duty.*" (The italics are ours.)

Three times, therefore, the Supreme Court of California, according to its own interpretation of its own opinions, approved this method of reaching the valuation of the franchise of a corporation.

It is impossible to believe that the Court, in the preparation of the majority opinion, gave that consideration to the cases of *Burke* vs. *Badlam, San Jose Gas Co.* vs. *January,* and *S. V. W. W.* vs. *Schottler,* cited above, which their significance required. Not only has the Supreme Court of California so interpreted the laws of California, but it has been held that "to come to any other conclusion would be to " impute to that body (the Legislature) a most cul- " pable dereliction of duty." Yet, the learned author of the majority opinion casts aside these solemn ad-

judications of the Supreme Court of California, as without relevancy to the point stated, and passes to the consideration of *Bank of California* vs. *San Francisco,* 142 Cal., 276, as the only case in that State having any bearing upon the subject, and, having stated as the principal expression of the rule the case which is but a reiteration of the holdings referred to in the three prior cases, the learned justice proceeds to a technical and, we respectfully submit, not altogether fair, review of that decision.

It is greatly to be regretted that the laws afford no method by which a misinterpreted Court may certify to the correct interpretation of its own opinion. It may be regarded as almost beyond human effort to so express the judgment of a Court as to leave it entirely free from misinterpretation. Especially is this true where the interpreting superior is without the influence of those environs and precedents which make the meaning clear to the Court rendering the opinion. Were it possible in this case to certify the view of the author and his associates on the Supreme Court of California as to what was intended to be decided in *Bank of California* vs. *San Francisco,* no doubt would be left of the fact that the majority opinion of this Court, has misinterpreted the opinion in that case, and that the correct view of the Court's intentional expression of the law of California is found in the opinion of Mr. Justice Brewer. I am satisfied it is a matter of regret, not only to the

appellee and the people of California, who have suffered this "grievous wrong," but also of the State Supreme Court. Certainly there was no intention, either expressed or implied, in the opinion in that case, of casting any doubt upon a principle of law so long established and generally observed as the principle of taxation for which we contend. From 1881, when the assessment referred to in *Burke* vs. *Badlam, San Jose Gas Co.* vs. *January,* and *S. V. W. W.* vs. *Schottler,* were made, until the assessment of 1901, twenty years thereafter, when the assessment of the Bank of California was made, no one had ever doubted that those cases required that the franchises of domestic corporations should be assessed at such a valuation as should equal the difference between the market value of the stock of such corporations and the value of their other corporate property. Instead of making a departure from the rulings of the Court in *Burke* vs. *Badlam, San Jose Gas Co.* vs. *January,* and *S. V. W. W.* vs. *Schottler,* in all of which cases that method of assessing a franchise value was approved, the Court, in *Bank of California* vs. *San Francisco,* expressly and repeatedly reaffirms and relies upon such cases. On the method of valuing a franchise, as stated in these cases, the Court says:

"The method of determining the value of the franchises there employed was declared by the Court to have been held to be within the powers of the Assessor in *San Jose Gas Co.* vs. *January,* 57 Cal., 614, and impliedly approved as a correct mode in *People ex re Burke* vs. *Badlam,* 57 Cal., 594. (See, also,

*Spring Valley Water Works* vs. *Burke*, 99 Cal., 36; *San Jose Gas Co.* vs. *January*, 57 Cal., 614; *London, etc. Bank* vs. *Block*, 117 Fed., 900.)"

Is it possible the Supreme Court of California designedly cast doubt upon a proposition of law, established and undisputed for twenty years, as a principle of taxation, and relied upon the cases in which such principle was confirmed for the purpose of stating such doubt? Does any member of the Court attribute to the Supreme Court of California any such unusual—extraordinary conduct? Can it be possible that the misuse of the word "if" in the language of a State Court, used in an opinion having every evidence of a contrary holding, should be so tortured and misinterpreted as to change the entire meaning of such opinion and defeat the operation of a material part of a State's system of taxation? When the Court of California said:

> "It is clear that if the laws of this State properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

it was not intended that any doubt should be cast upon the question, theretofore and for twenty years set at rest in that State. It is impossible to point this out more clearly than his Honor, Mr. Justice Brewer, has done in the dissenting opinion. To hold that the isolated phrase quoted has, or was intended to have, any such effect, is to disregard the plainest

rules of construction and the positive declarations of the Court.

## IV.

### ASSESSOR REQUIRED TO ASSESS IN ANY EVENT.

But, irrespective of the question whether the Supreme Court of California has affirmatively declared that the assessing officers of California shall ascertain and assess the full cash value of the stock of California corporations, in the manner in which such officers did so assess in the assessments reviewed and sustained in *Burke* vs. *Badlam, San Jose Gas Co.* vs. *January, S. V. W. W.* vs. *Schottler,* and *Bank of California* vs. *San Francisco,* it should be sufficient for this Court that the statutes of California contain the requirement that stock shall be assessed at its full cash value, and that the Supreme Court of that State has never doubted that they did so require. Had the Supreme Court of California never been called up to pass upon this question, would it occur to this Court to doubt that the tax laws of California require the stock of California corporations to be taxed at their full cash value? The Constitution of the State commands the taxation of shares of stock in proportion to value, to be ascertained as provided by law. The Legislature has declared how that value shall be ascertained by defining it to be the "full cash value," the value at which it would be

taken in payment of a just debt due from a solvent debtor.

Section 3628 of the Political Code commands:

> "The Assessor must, between the first Mondays in March and July of each year, ascertain the names of all taxable inhabitants, and all property in his county subject to taxation * * * and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at twelve o'clock meridian of the first Monday in March next preceding."

Section 3627 of the same Code defines how the assessment shall be made by requiring "all taxable " property must be assessed at its full cash value."

Read together the sections plainly require that the Assessor must assess all shares of stock at their full cash value. No quarrel is made by the majority opinion with the fact that the California system contemplates the assessment of the value of the stock through the medium of the property of the corporation. Such a method of reaching such value is found to be sufficient for the purposes of the Act of Congress. It is further conceded that good will, or dividend-earning power may be assessed under the denomination "franchise." How, then, is there any escape from the conclusion that it is the imperative duty of the Assessor to so assess the value creating elements possessed by the corporation at such value as shall equal the aggregate cash value of its shares of stock? The method employed in *Burke* vs. *Badlam, San Jose Gas Co.* vs. *January, S. V. W. W.* vs. *Schottler,* and *Bank of California* vs. *San Francisco,*

effected such a result. Such a method was approved in those cases. But there may be other methods of reaching the same result, and, if there are, nothing prevents the Assessor from adopting them. The law gives him a discretion in fixing the value of the property of the corporation, but he is imperatively required to so place that value as to equal the cash value of the entire stock of the corporation. If he does not employ a method which will make such a result possible he has failed to assess the stock of California corporations at its full cash value, and has violated a duty which the statute plainly and unequivocally places upon him.

*By the same rule of assessment is he required to assess national bank stock and none other.*

"The stockholders in every national banking association doing business in this State, and having its principal place of business located in this State, shall be assessed and taxed on the *value* of their shares of stock therein; and *said shares shall be valued and assessed as is other property for taxation* * * * *And the assessment and taxation of said shares of stock in said national banking association shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State.*"

Sec. 3609, Political Code.

Precisely the same rule of assessment is prescribed, therefore, for the assessment of national bank stock as is prescribed for "other moneyed capital," which, of course, includes the shares of stock of State corporations. In both instances, they are to be assessed at

their full cash value. The duty is as imperative in one case as in the other. Absolutely no distinction is made. The duty of the Assessor having been defined by positive law, which admits of no doubtful construction, it is not a question whether the Supreme Court of the State has affirmatively declared such laws to mean what they profess to mean, but the question is has the Supreme Court of the State said that they mean anything else. The positive law of the State having placed the duty upon the Assessor of taxing the shares of stock of California corporations at their full cash value, that is sufficient without a judicial reiteration of such duty. If it were true, therefore, which it is not, that the Supreme Court of California had not passed upon the duty of the Assessor in this behalf, that would suggest no reason for holding that the substantive law of the State did not require him to so assess shares of stock. The statute is plain and requires no interpretation, but it is difficult to understand how, in the light of the cases cited, it can be said that any doubt has been cast upon the duty of the Assessor in that behalf. On the contrary, the decisions sustain and enforce the law in its fullest vigor.

The majority opinion of the Court concludes:

"From this, of course, it would follow that, if the statutes of California, either from their text or as construed by the highest court of that State, compelled the assessing officers in the valuation of the property to State banks and other moneyed corporations to include also those elements of value which are em-

braced in the assessment of shares of stock of national banks, so that there would be an equality of taxation as respects national banks, the discrimination which we find to exist under the present state of the law of California would disappear."

Accepting this statement as an authoritative explanation of the views of the majority of the Court, we confidently submit that not only the revenue laws of California require, but the Supreme Court of that State has interpreted them to require such a method of assessment of the stock of State corporations.

## V.

### TRIED BY THE RECORD.

The majority opinion asserts: "We decide this case solely upon the record before us."

Let us see how far the record supports the views expressed.

*First*—What are the grounds of discrimination set forth in the bill of complaint and placed in issue by the answer? They are:

1—That the shares of stock of California corporations will not be assessed or taxed. It is stated thus:

"That under and by virtue of the laws of the said State of California, all shares of stock in corporations organized under the laws of said State * * * and especially in corporations organized under the laws of said States for the purpose of banking, all shares of stock thereof * * * are expressly exempt from assessment and taxation, and the same are not subject thereto, and that the respondent has not assessed, and will not assess * * * and does not intend to assess, to the holders of shares in corporations organized under the laws of the said State

of California, the value of the same, or to collect from such shareholders any taxes on said shares or the value thereof." (Page 13 of Record.)

Again, against this allegation of discrimination the majority opinion finds affirmatively. It says:

"As, then, no conflict necessarily arises between the Act of Congress and the state law, solely because the latter provides one method for taxation of state banks and other moneyed corporations and another method for national banks, it follows that the contention, that the State law, for that reason, is repugnant to the Act of Congress, is without merit."

The majority opinion then proceeds to consider the conclusion that "irrespective of the face of the "State law, that law is void because of discrimina- "tion against national banks within the principles "settled in the *Davenport* case." This conclusion, the majority opinion says, was embraced in the pleadings, was expressly covered by the stipulated facts, the overruling of which was assigned as error in the Circuit Court of Appeals and in this Court, and was elaborately discussed by both parties in the argument at law. Whether such contention was embraced in the pleadings is the only test whether it was in the case. If not within the pleadings, its assignment as error would not make a failure of the lower Court to consider it error, its insertion in the stipulated facts would not make it an issue, and its discussion as a precautionary matter would not authorize its consideration. The issue set forth in the pleading was addressed to the fact that the laws of

California expressly provided that the stock of California corporations should not be taxed otherwise than through the medium of the values of such corporations. This alone was relied upon in this paragraph of the bill, and this contention was affirmatively found against appellant by this Court. Finally the Circuit Court of Appeals did not consider this contention within the issues of the case, and did not pass upon it in *Nevada National Bank* vs. *Dodge,* the pleadings in which are the same as in the case at bar. The numerous counsel for appellant did not state it as an issue in their statement of their contentions, as set forth on pages 8 and 9 of "Brief for Appellant," and quoted in the minority opinion.

2—That a discrimination will result, against the shares of stock of national banks, from the fact that no deduction will be allowed to the holders of such stock on account of debts due from such holders to bona fide residents of California, whereas such deductions are permitted to the holders of other moneyed capital in the shape of solvent credits.

This conclusion was held by the majority opinion to be "without merit" on the authority of *Nevada National Bank* vs. *Dodge,* 119 Fed. Rep., 57.

3—That Sections 3608 and 3609 of the Political Code permit the deduction from the value of the shares of national banks of the value of all property exempt by law from taxation, and that, inasmuch as all property of national banks, except real estate,

is exempt by federal statute, and the value of such real estate is also required to be deducted, nothing remains to be taxed as the value of such shares.

This contention is also found to be "without merit." and the judgment of the Circuit Court of Appeals affirmed on this point on the authority of the same case.

## VI.

### NO EVIDENCE OF DISCRIMINATION.

Nor was there any evidence supporting the issue of discrimination assumed by the majority opinion to exist and made the sole basis of the reversal.

It appears from the agreed statement that the assessment complained of was made in the following manner:

> "The defendant, in making his assessment, fixed the value of the shares for taxation at $104.35 each, and arrived at that valuation in the following manner: He added to the capital stock of the bank, $500,000, its undivided profits amounting to $77,260, deducting the face value of United States bonds held by it, $50,000, and the value of its franchise, $5,500, leaving $521,760 as the total assessable value, and dividing that by the number of shares made the assessable value of each share the sum above cited."

The assessment of appellant was made, therefore, upon the actual tangible property of the bank. Nothing that existed in the imagination; nothing that was not present to the senses; nothing that was not demonstrated to exist by the books of the corporation itself, was assessed. The franchise value—the

value of its good will, its dividend-earning power, of these elements which go to form a part of the value of its stock—and are assessed to California corporations as franchises—was omitted in the assessment of the stock of the San Francisco National Bank.

If considered, they would have increased the value of the stock of the corporation and the tax thereon would have been increased. But all questions as to the propriety of assessing such elements was avoided by omitting to tax them. Certainly the bank could not complain of this. But, says the majority opinion, the national bank, although not itself assessed for such elements of value, may complain because some State corporation is not assessed therefor. This proposition is nothing short of extraordinary. The mere statements of it provokes surprise and doubt. Suppose every national bank in California had been assessed, as we assume from this record was the case, at the book value of the stock. Suppose that every California corporation had been assessed upon the same basis. Is it possible that there would have resulted any discrimination against national banks? Manifestly not. Suppose that every California corporation had been assessed on the book value of its stock plus a franchise value. Would there then appear any discrimination against national banking stock? Manifestly not. The Act of Congress does not require that shares of stock of California corporations shall be assessed at a

greater value than the shares of stock of national banks. If a national bank is assessed less than a State corporation, owing to the fact that certain properties in State corporations are assessed to it and not to the national bank, does it follow that the Act of Congress has been violated? Suppose the law of California did not permit the assessment of the shares of stock of a national bank at more than their book value, but required that the shares of stock of a California corporation should be assessed at their book value plus a franchise value. Could the national bank stockholder complain? And yet the majority of this Court, in deciding this case upon the record before it, from which it appears that the stock of the San Francisco National Bank was assessed at its actual book value, and the stock of the State banks was assessed in excess of its book value, has solemnly determined that the stockholder in the National Bank has been discriminated against.

This is certainly a most radical departure from the rule heretofore acted upon in this Court. In *Supervisors* vs. *Stanley,* 105 U. S., 305-311, this Court was called upon to consider the validity of a law of New York providing for the assessment of national bank stock. The law was attacked upon the ground that it did "not permit a stockholder of a "national bank to deduct the amount of his just "debts from the assessed value of his stock, while by "the laws of the State the owner of all other per-

" sonal taxable property can deduct such debts from " its value." As so interpreted by the Court of Appeals of New York, such deduction was not permitted and this Court held the law invalid so far as it affected those having debts to deduct. But, says the Court:

> "What is there to render it void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction."

And so in the case at bar, can appellant be heard to complain because the State bank was not assessed for a particular kind of property for which it was not itself assessed? If the law of California had provided for the assessment to California corporations of the value of their furniture, and had exempted the furniture of national banks from taxation, could the national bank complain? And so in the case at bar, when there is assessed to the California bank $750,000 for a franchise and nothing at all is assessed to the national bank as a franchise value, we are surprised to find this Court holding that the national bank has been the object of a discrimination.

The learned author of the majority opinion says this contention is reducible to this:

> "That, when property of one person worth a given amount

is assessed for its full value, no discrimination in favor of another results when the latter is assessed for a sum greatly below the value of the property assessed."

We are told that our law is void because we do not include good-will as an element in the valuation of the shares of our corporations. We answer that if that were true the appellant is not concerned because we did not include that element as an element in valuing its stock. If appellant's contention were sound we would not be discriminating against appellant, and there is not a syllable of evidence that we have assessed it for any good-will. Far from the statement in the stipulated facts that the Bank of California was assessed for $750,000 on franchise instead of $3,000,000 assisting appellant, it is a demonstration that that State bank was assessed upon properties which were not assessed to appellant, though undoubtedly owned by it.

But the evidence, on pages 84 and 85 of the Record, does show a statement of the financial condition of the Commercial banks of California, on the 31st day of March, 1900, as reported to the Bank Commissioners of that State.

An analysis of it, with particular reference to the market value of the stock of such corporations, which is placed at $30,000,000 on page 81 of the Record, will demonstrate that the assessment of the taxable property of State banks, in accordance with California's tax system, will impose a greater tax in

an assessment levied on the stock directly, than would be imposed upon national banks having the same assets and liabilities. And this will be found to be true, in the absence of any franchise tax whatever.

Numbering the items, shown by the tabular statement, from left to right, and classifying them according to the necessities of the tax system, we find the following:

| Line | | | |
|---|---|---|---|
| | ASSESSED AS STATE BANKS. | | |
| 1 | Bank Premises | $ 3,424,614.33 | |
| 2 | Other Real Estate | 8,431,854.16 | |
| 4 | Loans on Real Estate | 19,337,586.89 | |
| | Total Assessed on Real Estate | | $31,194,055.38 |
| | Assessed as Personal Property. | | |
| 3 | Invested in Bonds, Stock | 9,962,381.22 | |
| 8 | Money on Hand | 14,681,976.13 | |
| 10 | Other Assets | 2,370,585.28 | |
| | Total Assessed as Personal Property | | 27,014,942.63 |
| | Solvent Credits. | | |
| 5 | Loans on Stocks B. & W. | 14,741,763.67 | |
| 6 | Loans on other Securities | 4,977,526.69 | |
| 7 | Loans on Personal Security | 40,010,187.53 | |
| 8 | Due from Banks & Bankers | 24,315,194.52 | |
| | Total Sol. Credits | $84,044,672.41 | |
| | Less Debts. | | |
| 16 | Due for City & Co. Money | 212,373.78 | |
| 14 | Due Depositors, Resident | 84,197,990.80 | |
| 15 | Due Banks and Bankers | 8,617,452.31 | |
| | Total Debts | $93,027,816.89 | |
| | Balance Assessable | | —o— |
| | Total Assessment | | $58,208,998.01 |

Value of the Shares of Stock.

| | | | |
|---|---|---|---|
| 12 | Capital paid in on 263,407 shares | 26,340,790.12 | |
| 13 | Reserve, and Profit and Loss | 18,842,100.46 | |
| | Total Value of all the Shares | | 45,182,890.58 |
| | Assessment in excess of Book Value of all the Shares | | 13,026,107.43 |

ASSESSED AS NATIONAL BANKS.

| | | |
|---|---|---|
| The Assessment would be on Real Estate | | 31,194,055.38 |
| To the Individual Stockholders on their Shares. (A decrease when assessed as a National Bank of $13,026,107.43 over assessment of a State Bank with same capital and same assets.) | | 13,988,835.20 |
| Total | | $45,182,890.58 |

BOOK VALUE OF STOCK IN STATE BANKS.

| As per Line. | | | |
|---|---|---|---|
| 12 | Capital Stock paid in on 263,407 shares | 26,340,790.12 | |
| 13 | Reserve Fund and profit and loss | 18,842,100.46 | |
| 14 | Total Book Value of all the shares | | 45,182,890.58 |
| | or divided by 263,407 shares equals 171.53 a share. | | |

Which may be said to be invested as follows:

| | | | |
|---|---|---|---|
| 1 | Bank Premises | 3,424,614.33 | |
| 2 | Other Real Estate | 8,431,854.16 | |
| 3 | Invested in Bonds, Stocks and Warrants | 9,962,381.22 | |
| 4 | Loans on Real Estate | 19,337,586.89 | |
| 10 | Other Assets | 2,370,585.28 | |
| Part of Line 8 | Balance of Capital paid in held as money on hand | 1,655,868.70 | |
| | Total Investment of all the Capital Stock | | 45,182,890.58 |

Explanation: The State Banks have total Money on hand, $14,681,976.13, of which $1,655,868.70 is a part of the Capital Stock paid in, and $13,026,-107.43 is a part of the money due depositors. As the Constitution of California, Art. XIII, sec. 1, and Political Code, sec. 3617, paragraph 6, does *not* include *"money on hand"* as a *credit* from which *debts* (amount due depositors) can be deducted, a State bank assessed on its *assets* is obliged to pay on money on hand, whereas a National Bank assessed on the *value* of its *shares* and *not* on its *assets* receives that much lower assessment by virtue of being a National Bank. To illustrate:

A State Bank, paid-up Capital..... $100,000
Has Due Depositors ..... 1,000,000
It keeps a Cash reserve of 50 per cent or
Money on hand ..... 500,000
for which it is assessed—hence it is paying on 5 times its capital.

From this it appears that a national bank possessing the same properties would be assessed, under the State system, $45,152,890.58, including real estate.

That a State bank would be assessed for the same properties, $58,208,898.01, including real estate.

*It is the agreed fact that these commercial banks "are assessed and pay taxes in the manner and form "prescribed by the laws of the State of California"*

*and that "the said banks and said property were so "assessed and taxed for the fiscal year ending June "30, 1901, and the franchises of said commercial "banks and trust companies were also assessed to "said trust companies"* (Record, pp. 78-80).

It is further agreed that the aggregate value of the shares of stock of such banks and trust companies on the first Monday in March, amounted to the sum of $30,000,000 (Record, p. 81).

According to the record showing in this case, therefore, the commercial banks and trust companies of California, when assessed according to the laws of that State, and without any franchise value whatsoever, would be taxed nearly double the market value of their stock. This should satisfy the most exacting interpretation of the requirements of Congress.

## VII.

### DISCRIMINATION BY ASSESSING OFFICERS.

But, if we assume that there has been a discrimination against the holders of national bank stock, such discrimination has resulted, not from anything in the law of California requiring it, but from disobedience of such law by the assessing officers in administrating such laws. It is conceded by the majority opinion that there is nothing on the face of the tax laws of California requiring a discrimination. The burden of discrimination is placed upon

the assertion that the assessing officers, in assessing the value of the stock of California corporations, do not employ a method of valuation in valuing the property of such corporation that will bring such value up to the market value of the stock. There is nothing in the record indicating such to be the fact, but if there were, the effect would be to make the assessment complained of void. It would not follow, however, that the Act under which it was erroneously made, is unconstitutional. It cannot be said that the law may depend for its constitutionality upon the manner in which it is administered when such administration is contrary to the requirements of such law. It is the express mandate of the California law (Sec. 3609, Pol. Code) that the shares of stock of national banks shall be "assessed "as is other property for taxation," "and the assess- "ment and taxation of such shares of stock in such "national banking associations shall not be at a "greater rate than is made or assessed upon other "moneyed capital in the hands of individual citi- "zens of this State." Other moneyed capital, including shares of stock, is required by the Constitution and laws of the State, to be assessed and taxed at its full cash value. (Sec. 1, Art. XIII, Constitution of California; Sec. 3617, Political Code.) If the assessing officers did not heed the duty so imperatively placed upon them, and assess the stock

of California corporations for the year 1900-01, does it follow that they have rendered a law, otherwise constitutional, unconstitutional? It can scarcely be considered the law, that a statute may be constitutional when obeyed and unconstitutional when disobeyed. Yet such is the holding of the majority opinion of this Court, for, the law being constitutional on its face, is held unconstitutional on the unsupported assumption that the assessing officers have not given it full operation. Should another case be prosecuted, under the same law, in which it shall be made to appear that the assessing officers have included in the valuation of the property of all California corporations the elements of value which the majority opinion finds were omitted this year, would the law then return to its constitutional perfection? To state the proposition is to demonstrate that it is unsound. The constitutionality of a law cannot be made to depend upon the action of an executive officer who interprets it in such a manner as to give it an unconstitutional operation. Accepting all that is said in the majority opinion as true, it does not follow that the law is unconstitutional. The most that can be said is that the assessment is void because made in disregard thereof.

No more forcible way of closing this portion of this petition suggests itself than to quote the conclusion arrived at by the minority of the Court and set

forth with such convincing clearness by Mr. Justice Brewer:

"Summing the matter up, the Constitution declares that 'all property * * * shall be taxed in proportion to its value,' and defines 'property' as including 'franchises, and all other matters and things, real, personal, and mixed, capable of private ownership.' Franchises, dividend-earning, profit-earning power, are capable of private ownership. Indeed, the opinion of the Court is based on the contention that they are assessed to the holder of shares in national banks, and not assessed upon the State banks. Section 3608 provides that 'all property belonging to corporations (save and except the property of national banking associations, not assessable by Federal statute) shall be assessed and taxed.' Section 3609, that the shares in national banking associations 'shall be valued and assessed as is other property for taxation.' The Supreme Court of the State holds that a stockholder in a State bank 'could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate.' (142 Cal., 282, 64 L. R. A., 920; 100 Am. St. Rep., 135; 75 Pac., 835.) There is neither allegation nor evidence that there was any over-valuation of the plaintiff's shares of stock. The complaint is that there was a discrimination by reason of the failure to deduct from the value of the shares the entire value of the bank's tangible property, because 'used and employed by it in the conduct and carrying on its business as a national banking association.' And yet, in the face of the plain words of the Constitution and statutes, the clear language of the Supreme Court of California, and the absence of allegation or proof of actual discrimination, this Court, by its opinion, strikes down the whole system of California for the taxation of shares of national banks."

## VIII.

### THE REMEDY.

It is impossible to improve upon the learned and convincing review by Mr. Justice Brewer, and his associates, of the authorities in this Court denying relief by injunction in proceedings where interference is sought with the revenues of a State on the ground alone of the illegality of the tax complained of. The views therein expressed so faithfully reflect the equitable rules in that behalf as to lead to the conviction that, whatever may be the final issue of this cause, the position taken by the majority of the Court must be changed ultimately to conform to the views of the minority.

A further analysis of the tax laws of California discloses a further reason for denying relief in equity. As an integral part of the tax system of California there is established by the Constitution (Ses. 9, Article XIII), and the statutes, (Secs. 3672 *et seq.*, of the Political Code), State and County Boards of Equalization, which boards are charged by law with the equalization of assessments made, in the first instance, by the local assessors.

The county board to which the appellant might have applied for relief against an excessive or a void assessment, is empowered by Section 3673 of the Political Code: "After giving notice in such manner as "it may by rule prescribe, to increase or lower the

"entire assessment roll or any assessment contained "therein, so as to equalize the assessment of the "property contained in said roll, and make the as- "sessment to conform to the value of such property "in money."

And the Supreme Court of California, in considering the powers of the Assessor and the County Board of Equalization to correct and afford relief from excessive or void assessments, in *Henne* vs. *Los Angeles County*, 129 Cal., 299, said:

> "For an over-valuation of the assessment of property belonging to a taxpayer, a remedy is furnished him by statute, as already shown, first by an application to the assessor at any time before it passes out of his hand to the Board of Supervisors, and thereafter to the Board of Supervisors until the assessments have been equalized and the matter has gone beyond their control. As was said in *Osborn* vs. *Danvers*, 6 Pick., 98: 'But great mischief would follow if we were to hold that an excess of valuation would render an assessment illegal and void. And it is immaterial whether the excess is caused by including in the valuation property of which the person taxed is not the owner, or that for which he is not liable to be taxed. In both cases the remedy is the same. * * * His only remedy is application for abatement. For when a new right is created by statute, which at the same time provides a remedy for any infringement of it, that remedy must be pursued.' It was the fault of the plaintiff in this case that he did not obtain relief by one or the other of the modes indicated, inasmuch as his application was too late in both cases."

Here, then, we find the law of California, as interpreted by her own Courts, affording a plain, speedy and adequate remedy, not only for an over-valuation of property confessedly taxable, but for

relief from a valuation of property "for which he is not liable to be taxed." No pretense was made by appellant of availing itself of these remedies, either by application to the assessor or to the proper board of equalization. Indeed, the injunctive process of the Federal Courts was invoked before the State and its assessing officers had completed the assessment and determined finally the amount for which its stockholders would be assessed.

This is assigned as an additional reason why the judgment of the Circuit Courts should be affirmed.

### IN CONCLUSION.

In finally submitting this petition we suggest, in apology for the labor which its length will entail upon this Court in its consideration, that the questions involved are of the first importance to the integrity of the tax system of California. This is a case, which, unexpectedly broadening in its scope, must result, if permitted to remain as now decided, not only in the exemption of national bank stock from taxation—to the manifest disadvantage and injury of our State banking corporations,—but, in the doubt which is cast by the majority opinion upon established and long recognized rule in California for assessing and taxing the shares of stock of such corporations,—will distort and unsettle doctrines of purely local and State concern, upon which action has been confidently taken for twenty years. That

the State of California, either in statute or decision, has ever manifested any hostility to the national banking associations doing business within her borders is not and cannot be truthfully asserted. The decisions of her Courts have gone beyond the full measure of protection afforded by the Federal Statute (*Miller* vs. *Heilbron,* 57 Cal.) in support of the rights of such associations. This is the first time, in a statehood of fifty years, that any statute has ever been passed, addressed directly to the subject of State taxation of national bank stock, and so fair is that statute, both by its term and its operation, as to justify and sustain the view expressed by Mr. Justice Brewer, in which we are satisfied the entire Court concurs, that, "whatever may be the effect of "the statute in creating or opening the door to dis- "crimination, no one can read it and say that there "was intent to discriminate injuriously against "national banks. The statute is positive in its lan- "guage that national bank shares shall be assessed "and taxed as is other property, and there was be- "yond doubt an attempt on the part of the Cali- "fornia Legislature to cast only an equal burden of "taxation on such shares."

With equal fairness has the Supreme Court of the State addressed itself to the same subject (*Miller* vs. *Heilbron,* 57 Cal., 133; *McHenry* vs. *Donner,* 116 Cal., 20; *First National Bank* vs. *San Francisco,* 129 Cal., 96).

It was, therefore, and still is, with the entire confidence in the justice of her cause, that the State of California has submitted and does now submit to the final determination of this highest of all earthly Courts, the issues involved in this litigation. It is confidently expected that there will be addressed to the solution of those supreme issues the high abilities possessed by the members of this Court, and that the subject being considered will be approached and disposed of in that high-minded and liberal spirit which their dignity commands. With that exalted respect and pride which the bar of this nation feels for this supreme tribunal, it is submitted that the majority opinion of this Court does not evince that liberality of construction which we are justified in expecting in that large class of cases involving the taxing power of the States. The interpretation placed upon the decisions of California and especially upon the decision in *Bank of California* vs. *San Francisco,* 142 Cal., disregards the express holdings of that Court, and, placing the burden of the conclusion upon the use of the word "if" in the sentence, "It is clear that, if the laws of the State " properly express the intention that everything that " gives value to the shares of a corporation shall be " assessed as property of the corporation, the true " value of those shares is a most important element " in determining the value of such property," invokes the retort from the minority of the Court:

" Certainly it seems to me there is no justification in " torturing this word 'if' as overthrowing all the " clear declarations of the Court, as well as imply- " ing a destruction of the plain letter of the statute." When a denial is made not only of the power to tax national bank stock, but of the established and settled doctrine of a State for the taxation of its own corporations, it is but reasonable to expect that more substantial grounds will be found therefor. If there is to be found any doubtful passages in the laws or decisions of a State, such doubts should be resolved in favor of the taxing power. Especially when it is honestly doubted that any doubt exists, and no want of fairness is shown in the valuation or levy of the tax.

"Believing that a grievous wrong is done the State of California," and not desiring to "impute to this "Court an intention to favor national bank prop- " erty in the matter of taxation, and to lay down a " rule for its benefit which is denied to all other " property," we respectfully submit an opportunity should be afforded for a further consideration of this cause.

PERCY V. LONG,
City Attorney,
Solicitor for Appellee.

W. I. BROBECK,
Assistant City Attorney,
Of Counsel for Appellee.

## OPINIONS RENDERED ON FORMER HEARING.

For convenient reference there is printed herewith the opinions of Mr. Justice White and Mr. Justice Brewer, authors, respectively, of the majority and minority opinions in this case:

SAN FRANCISCO NATIONAL BANK,
*Appt.,*
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco.

*State taxation of national bank stock—discrimination.*

1. The adoption of a different method for taxing state banks and other moneyed corporations from that adopted for the taxation of national banks does not necessarily conflict with U. S. Rev. Stat. § 5219 (U. S. Comp. Stat. 1901, p. 3502), authorizing state taxation of shares of stock in national banks, but exacting that the tax, when levied, shall be at no greater rate than that imposed on other moneyed corporations.
2. A discrimination against national banks, and in favor of state banks and other moneyed corporations, forbidden by U. S. Rev. Stat. § 5219 (U. S. Comp. Stat. 1901, p. 3502), results from the taxation of shares of stock of national banks, under Cal. Pol. Code, §§ 3608-3610, at their market value, while the construction given by the highest state court to the provisions for the taxation of the "property" of state banks and other moneyed corporations does not require, although property is defined by Cal. Const., art. 13, § 1, as including "franchises," that the assessing officers shall include in the assessment all the intangible elements of value which form part of the market and selling value of shares of stock.

[No. 44.]

*Argued November 7, 1904. Decided February 27, 1905.*

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of California, dismissing a suit to restrain the enforcement of taxes on shares of stock of a national bank. Decrees of both courts below *reversed* and the cause remanded to the Circuit Court for further proceedings.

The facts are stated in the opinion.

Messrs. WILLIAM S. WOOD, E. S. PILLSBURY, ALFRED SUTRO, and LLOYD & WOOD for appellant.

Messrs. WILLIAM IRVIN BROBECK and PERCY V. LONG for appellee.

Mr. Justice WHITE delivered the opinion of the court:

The appellant bank sued to restrain the enforcement of state, county, and city taxes, levied for the year 1900, upon shares of stock of the bank. Adequate averments were made to show equitable jurisdiction. *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 904; *Hills* v. *National Albany Exch. Bank*, 105 U. S. 319, 26 L. ed. 1052; *Lander* v. *Mercantile Nat. Bank*, 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908. The taxes were alleged to be in conflict with the law of the United States. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502.

The case was submitted upon the pleadings and an agreed statement of facts. A decree of dismissal was affirmed by the circuit courts of appeals for the ninth circuit. That court deemed that the cause was controlled by the reasoning of an opinion delivered in deciding a previous case *(Nevada Nat. Bank* v. *Dodge)*, the opinion in which case is reported in 50 C. C. A. 145, 119 Fed. 57.

Before considering the connections relied on we quote the text of the Constitution of California directly relating to the subject in hand, and briefly advert to the legislation of that state which preceded the act under which the assailed tax was levied.

Section 1 of article 13 of the Constitution of California provides:

"All property in the state, not exempt under the laws of the

United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. . . . The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits of debts due to bona fide residents of this state."

Carrying out the command to provide for the ascertainment of the value of property to be taxed, it was enacted (Pol. Code, § 3627) that all taxable property shall be assessed "at its full cash value," and (Pol. Code, § 3617) that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt from a solvent debtor."

Prior to 1881 shares of stock of all corporations were taxed, and § 3640 of the Political Code commanded that the market value of the stock of a corporation should be taken as the value of the shares for assessment. Where the shares of stock were taxed no tax was levied upon the corporate property. This was because the supreme court of California had decided that to tax both the stock and the corporate property would be double taxation. *Burke* v. *Badlam,* 57 Cal. 594.

In the year 1881 the general system of taxing shares of stock was abandoned, and a rule was put in force taxing the corporate property. Section 3608 of the Political Code, which embodied this change, was as follows:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation, which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock; nor shall any holder thereof be taxed therefor."

The act of 1899, under which the tax in this case was levied, amended the section just quoted, by providing that all property belonging to corporations shall be assessed and taxed, "save and except the property of national banking associations, not assessable by Federal statute;" and by adding to the provision commanding

that no assessment shall be made of shares of stock in any corporation the following words: "Save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute." To carry out the change made by the provision just referred to two sections were added to the Political Code, *viz.*, 3609 and 3610. Section 3608, as amended by the act of 1899, and the two new sections resulting from that act, are in the margin.†

The first contention is that the law of 1899 is on its face in conflict with § 5219 of the Revised Statutes, because it taxes shares of stock in national banks, and does not tax such shares in state banks and other state moneyed corporations. As it is patent that the state banks and corporations are taxed on their property, the proposition reduces itself to this: That the states may not pursue the method permitted by the act of Congress of taking shares of stock in national banks, unless the same method is employed as to the stock of state banks and other state moneyed corporations.

In *Davenport Nat. Bank* v. *Board of Equalization*, 123 U. S.

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†3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also the corporate property, would be double taxation. Therefore, all property belonging to corporations (save and except the property of national banking associations, not assessable by Federal statute) shall be assessed and taxed. But no assessment shall be made of shares and stocks in any corporation (save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute).

3609. The stockholders in every national banking association doing business in this state, and having its principal place of business located in this state, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town, or county, or not; but in the assessment of such shares each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent cred-

83, 31 L. ed. 94, 8 Sup. Ct. Rep. 73, it was decided that the provision of § 5219 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 3502], authorizing the taxation of shares of stock in national banks, but exacting that the tax when levied should be at no greater rate than that imposed on other moneyed capital, did not require the states, in taxing their own corporations, "to conform to the system of taxing national banks upon the shares of their stock in the hands of their owners."

True it is in the *Davenport Case* it was also decided that the prohibition in the act of Congress of a higher rate of taxation of shares of stock in national banks than on other moneyed capital operated to avoid any method of assessment or taxation, the usual or probable effect of which would be to discriminate in favor of state banks and against national banks. True, also, is it that in the same case it was held that, even where no such discrimination

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its, in the same manner as such deductions are allowed by the provisions of paragraph 6 of § 3629 of the Political Code of the state of California. In making such assessment to each stockholder there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state.

3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholder of such assessment shall be necessary for the purpose of this act. And, in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid.

seemingly arose on the face of the statute, nevertheless, if from the record it appeared that the system created by the state in its pratcical execution produced an actual and material discrimination against national banks, it would be the duty of the court to hold the state statute to be in conflict with the act of Congress, and therefore void.

As, then, no conflict necessarily arises between the act of Congress and the state law, solely because the latter provides one method for taxation of state banks and other moneyed corporations and another method for national banks, it follows that the contention, that the state law, for that reason, is repugnant to the act of Congress, is without merit. And this brings us to consider the contention of the appellant, which we think was embraced in the pleadings, which was expressly covered by the stipulated facts, the overruling of which was assigned as error in the circuit court of appeals and by this court, and was elaborately discussed by both parties in the argument at bar, *viz.*, that, irrespective of the face of the state law, that law is void because of a discrimination against national banks, within the principles settled in the *Davenport Case.*

To determine this latter contention requires an analysis of the two systems which the law of California enforces, in order that the two may be accurately compared.

Under the law the shares of national banks must be valued at their "full cash value," which the statute defines to mean the amount at which they "would be taken for a just debt due from a solvent debtor." These words are but synonymous with the requirement that, in assessing shares of stock, their market value must be the criterion. This is the case, for, eliminating exceptional and extraordinary conditions, giving an abnormal value for the moment to stock, it is apparent that the general market value of stock is its true cash and selling value. That such is the meaning of the words in the legislation of California is indisputable, in view of the provision of § 3640 of the Political Code, which made market value the rule for assessing shares of stock during the period when the taxation of shares of stock generally prevailed, and that such requirement was mandatory was in effect held by

the supreme court of California. *Miller* v. *Heilbron,* 58 Cal. 133, 138.

What, then, was embraced in the assessment of the shares of stock at their full cash or selling or market value? It embraced, not only the book value of all the assets of the corporations, but the good will, the dividend-earning power, the ability with which the corporate affairs were managed, the confidence reposed in the capacity and permanency of tenure of the officers, and all those other indirect and intangible increments of value which enter into the estimate of the worth of stock, and help to fix the market value or selling price of the shares. Considering this subject in *Adams Exp. Co.* v. *Ohio State Auditor,* 166 U. S. 211, 41 L. ed. 974, 17 Sup. Ct. Rep. 604, the court said:

"The capital stock of a corporation, and the shares of a joint-stock association, represent, not only tangible property, but also the intangible, including therein all corporate franchises, and all contracts, privileges, and good will of the concern."

And in *Pullman's Palace Car Co.* v. *Central Transp. Co.,* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, this was reiterated. The court, after observing that, while the franchise was one of the things entering into the computation of market value of shares of stock, said (p. 154, L. ed. p. 115, Sup. Ct. Rep. p. 815):

"The probable prospective capacity for earnings also enters largely into market value, and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views."

That this doctrine is the rule in California is clearly shown by *Bank of California* v. *San Francisco,* 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832, for in that case the court, speaking of such elements of value as "dividend or profit earning power, or good will," said (p. 289, L. R. A. p. 924, Am. St. Rep. p. 141, Pac. p. 838):

"In this connection, it will be observed that these elements, so

far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders."

The state banks and other corporations are assessed on their property. Conceding that every species of property is assessed which is specifically enumerated as taxable in the state Constitution, it does not follow that the assessment of property as such includes good will, dividend earning power, confidence in the ability of the management, and all those other intangible elements which necessarily enter into the cash or selling value of shares of stock. As said in the passage already quoted from the *Pullman Case,* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, such elements "may enhance the value of the shares [of stock] in the market, yet [they] do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views." In the argument at bar no law of the state was referred to requiring that the assessing officers, in valuing the property of a corporation, should assess as property its good will, its dividend earning power, the confidence reposed in its officers, etc. From this analysis it results that in the one case, that of national banks, not only the value of all the tangible property, but also the value of all the intangible elements above referred to, is assessed and taxed, whilst in the other case, that of state banks and other moneyed corporations, their property is taxed, but the intangible elements of value which we have indicated are not assessed and taxed; the consequence being to give rise to the discrimination against national banks and in favor of state banks and other moneyed corporations forbidden by the act of Congress.

In the argument at bar this conclusion, it is insisted, is avoided, because, whilst under the text of the state statutes it may be that all the elements of value which are included in the assessment of shares of stock are not *eo nomine* assessed against state banks and other moneyed corporations as property, they are, nevertheless, assessed against such corporations under the denomination of "franchise," the duty of the assessing officer to do so being imperative, as the result of the interpretation given to the taxing law by the supreme court of the state. The proposition is thus stated in the argument of counsel:

"Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of the corporation is greatly in excess of the value of its property, other than its franchise. This fact was called to the attention of the state court, which recognized the force of this suggestion, and held, the Constitution and laws of the state require the assessment and taxation of the franchise of the corporation, and that its value, for the purpose of such assessment and taxation, was properly ascertained by deducting from the market value of its stock the value of its corporate property and assessing the remainder as franchise."

It may be conceded that, if the statutes have been interpreted by the supreme court of the state as thus asserted, and that, as so interpreted, they have been applied by the assessing officers, there would be an end to the discrimination which we have seen arises from the consideration of the result of the statutes when not so interpreted.

The question then is, do the decisions of the supreme court of California, as contended, place the positive duty on the assessor of including in an assessment of the franchises of state corporations all the elements of value which form part of the market or selling value of shares of stock?

Three cases are cited to sustain the proposition, *viz.*, *San Jose Gas Co.* v. *January*, 57 Cal. 614; *Spring Valley Waterworks* v. *Schottler*, 62 Cal. 69; and *Bank of California* v. *San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832.

Before coming to consider the last case cited, which is the one principally relied upon, we dispose of the two others by saying that they do not support the proposition. The first simply decided that where a part of a tax was asserted to be illegal, and a part was admitted to be valid, the duty existed to pay the confessedly legal part to justify relief concerning the portion claimed to be illegal. The second case but decided that the franchises of corporations were taxable as property, and, where a corporation enjoyed other franchises than the right to exist as a corporation, and the board of equalization, in assessing such franchises, had treated them as equivalent in value to the selling value of the capital stock, the courts had no power to interfere with the discretion lodged

in the assessing officers. In the last-cited and latest-decided case, *Bank of California* v. *San Francisco,* the controversy was this: The Bank of California was assessed on its property. The difference between the value of such property and the cash or selling or market value of the shares of stock of the corporation was $2,943,-096.92. The franchise, instead of being assessed for this amount, was valued only at $750,000. This valuation was resisted by the bank, upon the ground that it was so large that it must have included good will, dividend-earning capacity, etc., which, it was asserted, could not under the law be embraced in an assessment of franchises. The court elaborately reasoned (there being two dissenting judges) that, in view of the power of the assessors to value property, it "could not say" that the assessing officers had transcended their authority in making the valuation complained of. Speaking of the duty of the assessing officers, it was said (p. 288, L. R. A. p. 923, Am. St. Rep. p. 141, Pac. p. 837):

"'The duty of making the valuation was cast upon the assessor. The method of arriving at the valuation, the process by which his mind reached the conclusion [in cases where, as here, it is not pretended that he acted fraudulently or dishonestly], is matter committed to his determination.' . . . This appears to be determinative of the contention here made. . . . (p. 289, L. R. A. p. 924, Am. St. Rep. p. 141, Pac. p. 838.) Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property,—*viz.*, $2,943,-096.92,—was the value of the franchise, the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and, were we at liberty to review the judgment of the assessor and of the board of equalization upon those matters, we could not say that an assessment of $750,000 thereon is unjust, or that it includes such elements as dividend or profit-earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation."

After pointing out that these elements entered into the assessment of shares of stock at their market value, it was observed (p. 289, L. R. A. p. 924, Am. St. Rep. p. 741, Pac. p. 838):

"It is clear that, if the laws of the state properly express the in-

tention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

In other words, the court simply declared that *if* the law of the state properly expressed the purpose to tax everything of value, the assessor had a discretion to consider what was the selling value of shares of stock in fixing the value of the franchise. Instead of supporting the contention that the law obliged the assessor to attribute to the franchise the value of those intangible elements which it was conceded were embraced in the assessment of shares of stock, the reasoning of the opinion is to the contrary. As the cash, selling, or market value of the stock in the case before the court was conceded to have been nearly $3,000,000 greater than the tangible property assessed to the corporation, and the assessor had valued the franchise, not at that sum, but at only $750,000, it is patent that, if the law of California had been what it is now asserted the court held it to be, that the claim that there was an overvaluation of the franchise would have been so frivolous as to require only a statement of the law to decide against the claim of overvaluation.

But the court made no such statement. On the contrary, it stated its inability to judicially declare that an assessment was extravagant and grossly unjust which was more than $2,000,000 lower than it should have been if the law imposed the obligation on the assessor of valuing the franchise by the difference between the value of the tangible property assessed and the cash or selling value of the shares of stock. This inability to give relief was placed solely upon the discretion which the law lodged in the assessor. But this interpretation of the statute serves only to further demonstrate the discrimination which has been previously pointed out. This result is made clear by comparing the discretion lodged in the assessor in valuing the franchise of state banks or other moneyed corporations with the duty resting on him as to the valuation of shares of national banks. The wide difference between the *discretion* on the one hand and the *duty* on the other will be additionally demonstrated by a consideration of the dis-

crimination against national banks which has arisen in the practical execution of the statutes.

In the agreed statement of facts it was admitted that there are *in the state of California* 178 commercial (or state) banks, possessing a vast amount of capital, 18 of which were located in San Francisco. And, to quote from the statement, "that the manner in which franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30, 1901, by the assessor of the city and county of San Francisco, is illustrated by the case of the Bank of California, a banking corporation organized under the laws of the state of California." The assessment in question, which it is thus declared in the statement of facts is illustrative of the other assessments against state banks, was the one which was involved in the controversy decided in the *Bank of California Case, supra.* It is then recited in the agreed statement that the total property resources of the Bank of California, correcting a misprint in the record, were $5,156,903.08; and that the market or selling value of its capital stock was $8,100,000, a difference of $2,943,096.92; and that, deducting from the resources of the bank certain exemptions, the bank was assessed for property at $2,311,774. To this last-mentioned sum was added for franchise tax, not the difference between the value of the property and the selling value of the stock, which, as stated, was nearly $3,000,000, but only $750,000. It is insisted in argument that this statement shows but a single case of undervaluation of a state bank by the assessors, and therefore does not justify the conclusion that, in the exercise of their discretion, the assessors had generally, as to state banks and corporations, valued the franchises at less than the difference between the value of the property taxed and the market or selling value of the stock. But this contention disregards the fact that, by the agreed statement, it was expressly admitted that the assessment in question was illustrative of the assessments upon the other state banks and moneyed corporations. In view of the issues in the cause, as to which the facts were agreed, to say that the assessment in question only illustrated the case of the Bank of California would require us to disregard the agreed statement.

Finally, it is contended that, even if the state banks and other state moneyed corporations were assessed as illustrated by the

valuation placed on the Bank of California, the complainant national bank has no reason to complain because the assessment put upon its shares of stock was relatively no higher than that put upon the Bank of California, and therefore no discrimination was occasioned. This is predicated upon the fact that the value per share affixed to the stock of the complainant national bank was not higher, having sole reference to the value of the stock as shown by the book value of the assets, and, considering allowable deductions, than was the assessment put upon the Bank of California, considering, alone, the same elements. But there is no proof whatever that the stock of the complainant bank had a market or selling value higher than the value affixed to it by the assessor; and the items which were made the basis of the assessment against the stock are declared in the agreed statement to be the entire assets of the bank, and in the argument at bar on behalf of the assessor the value of the shares of stock of the bank in excess of their book value is assumed to have been only nominal. The proposition, therefore, comes to this,—although the complainant national bank was assessed at the full value of its stock, there was no discrimination in favor of the state bank, albeit there was a difference in excess of $2,000,000 between the value put upon the property and franchise of the state bank and the sum which should have been levied against it, if all the elements had been assessed which enter into the value of shares of stock. And, thus analyzed, the contention is again reducible to this proposition,—that, where property of one person worth a given amount is assessed for its full value, no discrimination in favor of another results when the latter is assessed for a sum greatly below the value of the property assessed.

What has just been said disposes, also, of the contention that, if the national bank had been assessed under the state law by the rule applied to state banks, it would have had affixed to its property a slightly higher valuation than was given as the value of the shares of its capital stock. Without stopping to point out the error in the calculation by which this result is supposed to be demonstrated, it suffices to say that the contention would have merit only in the event that the property and franchise of all state banks had no higher value than the book value of the shares of stock. The fallacy underlying the whole contention cannot better be

made clear than by the mere reiteration of the statement that, under the facts as agreed, it is obvious that the shares of stock of the national bank were assessed for all they were worth under the rule of market or selling value, whilst the state bank was only assessed for $750,000 above the book value of the stock, although the cash, selling, or market value would have required an assessment of nearly $3,000,000.

Many contentions were argued at bar involving the assertion that the state law was invalid because of deductions of debts or exempt property which, it was asserted, the law allows to state banks and other moneyed corporations on an assessment of their property, and does not allow holders of shares of stock in national banks. Most of these contentions are, in effect, disposed of by the consideration which we have given to the proposition that the state law was void simply because it established different methods of taxation as to the two classes of corporations. In so far as the contentions referred to are not, in effect, disposed of by our conclusions on that subject, we content ourselves with saying that we think all such propositions were rightly decided by the court below to be without merit, for the reasons expressed in the opinion delivered by that court in the *Nevada Bank Case,* to which the court referred, and upon which it placed its rulings. We decide this case solely upon the record before us. Our conclusion, therefore, does not deny the power of the state of California to assess shares of stock in national banks, provided only the method adopted does not produce the discrimination prohibited by the act of Congress. From this, of course, it would follow that, if the statutes of California, either from their text or as construed by the highest court of that state, compelled the assessing officers in the valuation of the property of state banks and other state moneyed corporations to include all those elements of value which are embraced in the assessment of shares of stock in national banks so that there would be an equality of taxation as respects national banks, the discrimination which we find to exist under the present state of the law of California would disappear.

*The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed,* and the cause is re-

manded to the Circuit Court for further proceedings in conformity with this opinion.

Mr. Justice BREWER, with whom the CHIEF JUSTICE, Mr. Justice BROWN, and Justice PECKHAM concur, dissenting:

I am unable to concur in the foregoing opinion, and, believing that a grievous wrong is done to the state of California, will state the reasons for my dissent. Section 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502), prescribes the conditions and limitations of state taxation of national banks. In reference to it, we said in *Owensboro Nat. Bank* v. *Owensboro,* 173 U. S. 664, 669, 43 L. ed. 850, 852, 19 Sup. Ct. Rep. 537, 539:

"This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property, or their franchises. By its unambiguous provisions, the power is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank."

By the section two restrictions, and two only, are placed on the power of the state to tax the shares of stock: "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere."

No uniform rule is prescribed by Congress as to the mode of assessment or the manner in which the state shall impose its burden of taxation on the shares of stock in national banks. Each state is left to determine that according to its own judgment. All that is demanded is that in fact neither the rate of tax nor the assessment shall discriminate against national banks, and that the property subject to taxation shall not be burdened in excess of the burdens cast upon other moneyed capital. *Davenport Nat. Bank* v. *Board of Equalization,* 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. Rep. 73.

The mandate of § 1 of the Constitution of California is:

"All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys,

credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

Thus, the Constitution requires the taxation of all property and a taxation in proportion to its value, and defines property as including everything capable of private owership. Certainly, if the mandate of the Constitution is expressed in the statutes the shares of stock in national banks will be subjected to the same rate of taxation as all other property in the state, including therein moneyed capital. It must, therefore, be held that the legislation respecting the taxation of national bank shares is in defiance of the state Constitution before it can be adjudged in conflict with the equality provision of § 5219, Rev. Stat. Or, in other words, thaat the legislature of California disregarded the requirements of their own Constitution in order to subject to taxation property protected by Federal laws.

The legislation of California in this regard is found in § 3608 of the Political Code, as amended in 1899, and two additional sections enacted in that year, numbered 3609 and 3610:

"3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associations not assessable by Federal statute, shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute.

"3609. The stockholders in every national banking association, doing business in this state, and having its principal place of business located in this state, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city,

town, or county, or not; but, in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provision of paragraph 6 of § 3629 of the Political Code of the state of California. In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state.

"3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this act. And, in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid."

The rule of valuation is prescribed by the 5th subdivision of § 3617 of the Political Code, which provides that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor." It is true that prior to 1881 market value was made the rule of valuation, but the section prescribing that rule was, so far as it applied to national bank shares, adjudged void by the supreme court of the state *(Miller* v. *Heilbron,* 58 Cal. 133), and wholly

repealed by the legislature (Stat. 1881, p. 59), and in lieu of that the present rule of valuation established. But the rule of valuation is not so material, and, doubtless, an established market value would be the amount at which property would be taken in payment of a just debt due from a solvent debtor. The main thing is that the same rule of valuation shall be applied to the assessment and taxation of national bank shares as of other moneyed capital. And the express declaration of § 3609 is that the shares in national banks "shall be valued and assessed as in other property for taxation."

From the sections quoted it appears that the method of reaching the property of state corporations for purposes of taxation is by treating the corporation as owner of all, and casting the burden of taxation directly upon it, while, on the other hand, in obedience to the requirements of the Federal statute, taxation in respect to national banks is limited to an assessment and taxation of the shares of stock. But there is no discrimination if the same property is reached by each method, and by each subjected to the same rule of valuation. By § 3608 all the property of state corporations must be assessed and taxed, and the word "property" is defined by the Constitution to include, not merely tangible assets, but also "franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Everything, therefore, which is a part of the property of a state corporation is subject to assessment and taxation. No other or larger burden is cast upon shares of national banks, and surely there can be no discrimination when the entire property in the one instance is taxed as a whole to the corporation and in the other instance subdivided and taxed to the stockholder. The whole is neither less nor more than all its parts. But it is said there is no specific command to include in the property of a state corporation the good will, dividend-earning power, and the like, and that they are necessarily included in the selling value of the stock of any corporation. It is true, these items are not in terms mentioned, but neither are desks and furniture. The language is general, so general that it includes everything, not excepting good will, dividend-earning power, and the like, for they are "capable of private ownership." They belong to the corporation. There is no good will in a share

of stock over and above the good will which belongs to the corporation, and, if the corporation sells and conveys all that it possesses "capable of private ownership," it sells and conveys its good will, and there is nothing left of good will or anything else belonging to the stockholders. This is so plain that he who runs may read. It is hardly necessary in a matter so clear to refer to the decisions of the supreme court of California, and yet they are direct upon the proposition. Thus in *Burke* v. *Badlam*, 57 Cal. 594, the court said (pp. 601, 602):

"Now, what is the stock of a corporation but its property, consisting of its franchise and such other property as the corporation may own? Of what else does its stock consist? If all this is taken away, what remains? Obviously nothing. *When, therefore, all of the property of the corporation is assessed,—its franchise and all of its other property of every character,—then all of the stock of the corporation is assessed, and the mandate of the Constitution is complied with.* This property is held by the corporation in trust for the stockholders, who are the beneficial owners of it in certain proportions called shares, and which are usually evidenced by certificates of stock. The share of each stockholder is undoubtedly property, but it is an interest in the very property held by the corporation. It is his right to a proportionate share of the dividends and other property of the corporation,—nothing more. When the property of the corporation is assessed to it, and the tax thereon paid, who but the stockholders pay it? It is true that it is paid from the treasury of the corporation before the money therein is divided, but it is substantially the same thing as if paid from the pockets of the individual stockholders. To assess all of the corporate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each. As well might it be contended that the property of a partnership should be assessed to the firm, and, in addition, that the interest of each partner in the firm property should be assessed to him individually. If I have an interest in partnership property, my interest therein is prop-

erty. It is the right I have to share in the profits and property of the firm, in proportion to the interest I own. But my property rights are confined to the property held by the firm, just as the property rights of the stockholder in the corporation are confined to the property held by the corporation. In the case of a partnership, take away all the property of the firm, and I have no longer any property as a partner. In the case of the corporation, take away all of its property, which, it must be remembered, includes its franchise, and the shareholder no longer has any property. The cases are parallel. If in the one case it is competent to assess to the corporation all of the property held by it, and to the individual stockholders the respective interest owned by each therein, so must it be competent to assess to every partnership the property held by the firm, and to each individual partner his interest therein. It is clear to our minds that in the one case the partner, and in the other the stockholder, would be compelled to pay twice on the same property, which is neither required nor permitted by the Constitution. *In the case of corporations to which we have referred the legislature has declared that all of the property held by such corporations shall be assessed to them. It has not attempted to exempt any property from taxation not exempted by the Constitution itself, and, of course, could not do it if it had. It has only said that the property shall be assessed to the corporation, and shall not be again assessed for the same tax. This it had the right to say.*" (Italics in this and succeeding quotations are mine.)

It will be seen from this quotation that the court places partnerships on the same basis as corporations. If the partnership sells out its property, including its good will and its profit-earning power, which are part of its property under the constitutional definition of property, there is nothing left to the separate partners. The whole thing has passed to the purchaser, and in the same way when a corporation makes a sale. And to hold that the good will and profit-earning power must be specifically mentioned is to hold that the constitutional definition of property is insufficient; that good will and profit-earning power are not "capable of private ownership," or do not belong to the corporation. *Burke* v. *Badlam* was reaffirmed in *Bank of California* v. *San Francisco*, 142

Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832, decided since the decision of this case by the court of appeals. This case is very instructive. It was an action brought by the plaintiff, a state bank, to have an assessment of its franchise declared illegal and void, and to recover the amount paid by it under protest as taxes thereon. The contention of the plaintiff was that it did not own or possess any franchise whatever; that the only franchise in any way connected with it was the corporate franchise, the franchise of being a corporation, which was the property of the stockholders and not assessable or taxable to the corporation. It appears from the opinion that the assessor found that the aggregate value of the tangible property of the bank was $5,156,903.08, that the market value of all the shares of the capital stock was $8,100,000, and the difference between the two was by him ascertained and determined to be the value of the franchise of the bank. The state was not challenging the assessment, and, of course, no inquiry was made as to the propriety of an increase in the valuation.

In reply to the contention of the plaintiff, the court uses this language:

"It was said by the Supreme Court of the Unitetd States, in *Society for Savings* v. *Coite,* 6 Wall 594, 606, 18 L. ed. 897: 'Corporate franchises are legal entities vested in the corporation itself as soon as it is *in esse.* They are not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation, upon the possession of its franchises, and, whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises.'

"If this corporate franchise is assessable as property, then, that it must be assessed to the corporation instead of the members or stockholders is clearly settled in this state by the decision in *Burke* v. *Badlam,* 57 Cal. 594, *where it was held that a stockholder could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate.* See also Pol. Code, § 3608."

Again, referring to *Burke* v. *Badlam*, 57 Cal. 594, the court said (p. 285, L. R. A. p. 922, Am. St. Rep. p. 138, Pac. p. 836):

"This case necessarily involved the question as to the constitutionality of § 3608 of the Political Code, prohibiting the assessment of shares of stock to the holders thereof. Such shares being undoubtedly property, unless they were otherwise assessed, the section was clearly unconstitutional, in view of the provision of the Constitution requiring all property to be taxed. *According to the decision of the court they were under the law to be otherwise assessed—i. e., everything represented by the certificate was to be assessed to the corporation.*"

And again, on p. 289, L. R. A. p. 924, Am. St. Rep. p. 141, Pac. p. 838:

"Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property—*viz.*, $2,943,096.92—was the value of the franchise, *the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and, were we at liberty to review the judgment of the assessor and the board of equalization upon those matters, we could not say that an assessment of $750,000 thereon is unjust, or that it includes such elements as dividend or profit-earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation. In this connection, it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the state is at liberty to adopt,—in fact, bound to adopt,—unless such shares are otherwise covered by the assessment of the property of the corporation.*

"It is clear that, if the laws of this state properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

"I have made these extensive quotations from the opinions of the supreme court of California, for in cases like this we follow the construction placed by the highest court of the state upon its

statutes. Obviously, that court construes them as including within the corporate property the aggregate value of all the shares of stock, and that, while they forbid the assessment and taxation of shares of stock in a state corporation, they require that all the value represented by those shares of stock be assessed and taxed against the corporation; so that, when you ascertain the value of a single share of stock, and multiply that by the number of shares in the corporation, you have the value of the corporate property subject to taxation.

After declaring that the prohibition of the assessment and taxation of shares was clearly unconstitutional, unless they were otherwise assessed, it added, referring to the case of *Burke* v. *Badlam,* "according to the decision of the court they were under the law to be otherwise assessed,—*i. e.,* everything represented by the certificates was to be assessed to the corporation." Now, if, as claimed, the shares represent, not merely the tangible property, but the franchise, the dividend-earning power, then, as stated, "everything represented by the certificates was to be assessed to the corporation." And this language is followed by the declaration, referring to dividends, profit-earning power, good will, etc.: "In this connection it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the state is at liberty to adopt,—in fact bound to adopt,—unless such shares are otherwise covered by the assessment of the property of the corporation." Reference is made to the use of the word "if" in the last paragraph of the quotation, as though that implied a doubt as to the meaning of the state statutes. But surely that cannot be, in view of the prior declaration in the same opinion, that "everything represented by the certificates was to be assessed to the corporation." The paragraph is to be read as though it said that provided the laws of the state properly express the intention, as we have already held that they do, then the true value of the shares is an important element in determining the value of the corporate property. The same word "if" is used at the commencement of the second paragraph of the quotation "if this corporate franchise is assessable as property," in like manner, for the word "franchises" is found in the

constitutional definition of property, the paragraph preceding "if" declares that "the corporation itself has a legal interest in such franchises," and the very paragraph says that "the assessment of all the property of the corporation covered everything represented by the certificate." Certainly it seems to me there is no justification in torturing this word "if" as overthrowing all the clear declarations of the court, as well as implying a destruction of the plain letter of the statutes.

But great reliance is placed upon the admission, in the agreed statement of facts, "that the manner in which franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30, 1901, by the assessor of the city and county of San Francisco, is illustrated by the case of the Bank of California, a banking corporation organized under the laws of the state of California." In the assessment of that bank the assessor did not add to the value of the tangible property the difference between that value and the market value of the capital stock, but a sum very much less. A tabular statement is also annexed, showing the financial condition during the year of the 178 state banks of California. It might be sufficient to say that the stipulation is satisfied by a conclusion that the assessor, in assessing state banks, generally added to the value of the tangible property something on account of the franchise,—we are not compelled to infer that the valuation of the tangible property of each bank he added $750,000, or even that he failed to add the full difference between the value of that property and that of the stock. Indeed, it does not appear from the tabular statement that the market value of the shares in a single state bank in California exceeded the value of its tangible property. So that, so far as that evidence goes, the only case in which there was any franchise value to be added was that of the Bank of California. But more significant is this: It appears from the agreed statement that the assessment complained of in this case was made in the following way:

"The defendant, in making his assessment, fixed the value of the shares for taxation at $104.35 each, and arrived at that valuation in the following manner: He added to the capital stock of the bank, $500,000, its undivided profits amounting to $77,260, deducted the face value of United States bonds held by it, $50,000,

and the value of its furniture, $5,500, leaving $521,760 as the total assessable value, and dividing that by the number of shares made the assessable value of each share the sum above stated."

In other words, the only assessment against the plaintiff's shares was based upon the value of the tangible property. Not a dollar was added to the valuation on account of franchise, good will, or dividend-earning power, or anything of that kind. Or, to put it in another form, the assessment of the state bank added to the value of the tangible property something for the value of the franchise, the assessment of the plaintiff stopped with the tangible property, and yet it is held that there was an actual unjust discrimination against the plaintiff. And how is this conclusion reached? By assuming that the shares in the plaintiff bank had no value above the value of the tangible property. But this is a mere assumption. A more rational guess would be that the shares of stock in a bank whose undivided profits were over 15 per cent of its capital had a value much above the par value of its stock or the value of its tangible property. And can it be that the whole system of the legislation of a state in respect to the taxation of national banks can be stricken down upon an unfounded assumption that the shares of a given national bank were worth no more than its tangible property? If the complaint was of an actual discrimination it was a part of the plaintiff's duty to prove it, and show that its shares had no value above that of the tangible property, and would not "be taken in payment of a just debt due from a solvent debtor" at a larger sum. The most elementary rule of judicial proceedings is that a party, to make out his cause of action, must prove, not assume, the existence of all essential facts.

But I need not rest upon the omission of proof. There is no allegation of any discrimination based upon such difference of valuation. The eleventh and twelfth paragraphs of the complaint state the wrongs on account of which relief is sought. In order that there may be no misunderstanding of the full scope of the causes of action alleged I quote these paragraphs entire:

"Eleventh.—That the said assessment and taxation, so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator, will be in violation of, and repugnant to, the provisions of §§ 5219 and 1977 of the Re-

vised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 1259, 3502), in that the said assessment and taxation will be at a greater rate than is or will be assessed upon other moneyed capital in the hands of individual citizens of the said state of California. And in that behalf your orator shows that, under and by virtue of the laws of the said state of California, all shares of stock in corporations organized under the laws of the said state and amounting to more than the sum of two hundred million dollars ($200,000,000), and especially in corporations organized under the laws of the said state for the purpose of banking, all shares of stock thereof amounting to more than the sum of thirty-five million dollars ($35,000,000), are expressly exempt from assessment and taxation, and the same are not subject thereto, and that the respondent has not assessed, and will not assess, for the said fiscal year ending June 30th, 1901, and does not intend to assess, to the holders of shares in corporations, organized under the laws of the said state of California, the value of the same, or to collect from such shareholders any taxes on said shares or the value thereof.

"And your orator further shows that the said pretended assessment and taxation so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator will be in violation of, and repugnant to, the provisions of said § 5219 of the Revised Statutes of the United States, in that the said taxation will be at a greater rate than will be assessed upon any other moneyed capital in the hands of individual citizens in the state of California. And, in that behalf, your orator further shows that, in assessing and taxing the said shares of the capital stock of your orator, no deduction will, or can legally, be made from the valuation of said shares, or any of them, of debts unsecured by deed of trust, mortgage, or other lien on real or personal property due or owing by the stockholders of your orator, or by any of them, to bona fide residents of the state of California; and that, in assessing and taxing other moneyed capital in the form of solvent credits unsecured by deed of trust, mortgage, or other lien on real or personal property, due, or owing to, or in the hands of, individual citizens in said state of California, the respondent does and will make a deduction from said credits, under and by

the Constitution and laws of the state of California, of the debts unsecured by trust deed, mortgage, or other lien on real or personal property as may be owing by such individual citizens, or by any of them, to bona fide residents of the state of California, and that said threatened assessment and taxation of the shares of your orator is, and will be, unjust, unlawful, and illegal, and will discriminate against and upon such shares and against and upon the persons owning and holding the same, and will compel them to sustain and bear more than their just share and burden of the taxes of the said state of California. And in this behalf your orator further avers that it is informed and believes, and upon such information and belief states, the fact to be, that the amount of moneyed capital in the ctiy and county of San Francisco in said state of California on the first Monday of March, 1900, to wit, on March 5th, 1900, at noon of said day, invested by banks and bankers, having their principal place of business in said city and county, and residents therein, in unsecured solvent credits, and from which, under the Constitution and laws of said state, unsecured debts can be deducted, was the sum of $14,074,561; and on the day and year last aforesaid the amount of moneyed capital in the state of California, other than in the said city and county of San Francisco, invested by banks and bankers in unsecured solvent credits, and from which, under the Constitution and laws of said state, unsecured debts can be deducted, was the sum of $7,589,302; that on the day and year last aforesaid said banks and bankers at said city and county of San Francisco had debts unsecured by trust deed, mortgage, or other lien on real or personal property owing by such banks and bankers in said city and county, amounting to the sum of $36,710,062; and that on said day last aforesaid the amount of debts unsecured by trust deed, mortgage, or other lien on real or personal property owing by said banks and bankers in the state of California, other than in the said city and county of San Francisco, was the sum of $32,400,304; that the amount of moneyed capital invested in such solvent credits by such banks and bankers on the day and year last aforesaid, in said city and county of San Francisco and in said state of California, as compared with the amount of moneyed capital invested in the shares of the capital stock of your orator, is so large and substantial that the assess-

ment and taxation of the shares of the capital stock of your orator without deducting therefrom, and without being able to deduct therefrom, debts unsecured by trust deed, mortgage, or other lien on real or personal property, as may have been owing by the respective holders of the shares of the capital stock of your orator on the day and year last aforesaid, will be an illegal and unjust discrimination against the owners and holders of the shares of the capital stock of your orator, and will make the taxation of said shares of stock at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens in the state of California, and particularly in the city an county of San Francisco in said state. And in this behalf your orator further avers that the said solvent credits so held as aforesaid by banks and bankers in the said city and county of San Francisco and in the said state of California are moneyed capital in the hands of individual citizens of the state of California, which enter into competition for business with your orator.

"Twelfth.—That, in the making of the said assessment of the said shares of the capital stock of your orator, the respondent will not proceed in the manner directed by the said act of March 14th, 1899, in this: That the said respondent, as hereinbefore set out, will ascertain and determine the value of each of the shares of the capital stock of your orator to be the sum of $115,452, and will deduct therefrom the sum of $11.10 per share as the proportionate amount per share of the value of the United States bonds held by your orator to secure its circulation, and of its furniture, and will, as hereinbefore set out, assess to the stockholders the sum of $104.36 per share as the value of each share of said capital stock by the said respondent claimed to be subject to assessment and taxation under the provisions of said act of March 14th, 1899, and that the respondent will wholly fail and refuse to make any other or further deductions from such ascertained value of said shares, in order to determine the assessable value thereof; whereas, by the provisions of said § 3609 of the Political Code of the state of California, under and in pursuance whereof the respondent has threatened and intends to make the said assessment, and will proceed to demand, and will attempt to collect, the taxes aforesaid, he was and is required to deduct from the value of each

share of the capital stock of your orator such sum as is in the same proportion to such value as the total value of the real estate and property of your orator exempt by law from taxation bears to the whole value of all the shares of the capital stock of your orator. That on the first Monday of March, 1900, to wit, on March 5th, 1900, at twelve o'clock M. of said day, your orator had not, and thence hitherto has not had, nor has it now, any real estate, and, as in paragraph 'eighth' hereof averred, all of the property of your orator consisted on said day and at said time, and has thence hitherto consisted, and does now consist, of its bonds, money on hand, credits, furniture, and other personal property, and on said day and at said time the same constituted and were, and thence hitherto have been, and now are, the assets of your orator, and were and are used and employed by it in the conduct and carrying on its business as a national banking association under and by virtue of the provisions of the act of the Congress of the United States known as the national banking act, and were and are exempt by law from assessment and taxation. That, if deduction of all the property of your orator exempt from assessment and taxation as last aforesaid were made to each stockholder in assessing said stock, there would remain nothing of value subject to assessment and taxation; and that the pretended assessment and taxation of said shares at said value of $104.36 per share would be based wholly upon supposed and fictitious property, and upon property exempt by the Constitution and laws of the United States from assessment and taxation."

The first of these paragraphs alleges a violation of the Federal statute in the taxation of plaintiff's shares of stock, because under and by virtue of the laws of California all shares of stock in state corporations are exempt from assessment and taxation, and the assessor does not intend to assess to the holders the value of those shares. But, as repeatedly held, a mere difference in the methods of state and national bank taxation is not repugnant to the act of Congress. The balance of the paragraph is substantially a charge of a discrimination by reason of a failure to deduct debts. But that, it is conceded in the opinion of the court, may be put one side,—a concession undoubtedly compelled by the facts as agreed upon, for an opportunity was given to each stockholder in the

plaintiff bank to have any debts deducted, and no one of them sought to avail of this privilege.

The other paragraph charges a discrimination and that the assessor ascertained the value of the shares of the capital stock of the plaintiff at the sum of $115,452 and deducted therefrom the sum of $11.10 per share as the proportionate share of the value of United States bonds held by the bank; that he refused to make any further deductions, although the various items of property held by the bank, consisting of bonds, moneys, credits, etc., "were and are used and employed by it in the conduct and carrying on its business as a national banking association, under and by virtue of the provisions of the act of Congress of the United States known as the national bank act, and were and are exempt by law from taxation." The complaint here is that the tangible property of the national bank is wholly exempt from taxation because used for the purpose of carrying on the banking business, and, as the only assessment of plaintiff's shares was based upon the value of the tangible property, the entire assessment was void. Now, it is not pretended in the opinion of the court, nor can it be successfully claimed in view of prior decisions of this court, that shares of stock in a national bank are subject to taxation to only the extent of the excess of their value above that of the tangible property of the corporation, and yet that is the burden of plaintiff's complaint. I have made this extensive quotation because it is apparent therefrom that the matter which, in the judgment of the court, is sufficient to overthrow the law of California in respect to the taxation of national banks, was not charged or complained of by the plaintiff. If the plaintiff neither alleges nor proves any discrimination in the matter of valuation I cannot understand why this court should assume that there was one, and thereupon upset the tax.

Further, there is no reference in the opinion of the court of appeals to any discrimination in fact.

Still further, counsel for plaintiff in error evidently fail to perceive any actual discrimination, as appears by this quotation from their brief:

"The questions involved in the appeal are:

"(1) That the act of 1899, providing for the assessment and

taxation of shares of the capital stock of national banks, is repugnant to the provisions of § 5219 of the Revised Statutes of the United States:

"*(a)* Because shares of stock in the commercial banks of the state are not taxed, and are exempt;

"*(b)* Because, by reason of the failure to tax shares in the commercial banks of the state, the shares of national banks are subjected to an adverse discrimination, and taxed at a higher rate than such commercial bank shares;

"*(c)* Because the provisions § 3609, are wholly void, in that it is thereby undertaken to provide that a stockholder may deduct from the value of his shares the amount of his debts due to bona fide residents of the state.

"(2) That, under the express provision of the Political Code, §§ 3608 and 3609, the whole property of the appellant included in the assessment was exempt from taxation."

The only reference to discrimination is the alleged legal one, "by reason of the failure to tax shares in the commercial banks of the state." If the failure to tax shares in the commercial banks of the state does not of itself work a discrimination, as is practically conceded in the opinion of the court, then the whole basis of plaintiff's complaint fails.

Summing the matter up, the Constitution declares that "all property . . . shall be taxed in proportion to its value," and defines "property" as including "franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Franchises, dividend-earning, profit-earning power, are capable of private ownership. Indeed, the opinion of the court is based on the contention that they are assessed to the holder of shares in national banks, and not assessed upon the state banks. Section 3608 provides that "all property belonging to corporations (save and except the property of national banking associations, not assessable by Federal statute) shall be assessed and taxed." Section 3609, that the shares in national banking associations "shall be valued and assessed as is other property for taxation." The supreme court of the state holds that a stockholder in a state bank "could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by

the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate." [142 Cal. 282, 64 L. R. A. 920, 100 Am. St. Rep. 135, 75 Pac. 835.] There is neither allegation nor evidence that there was any overvaluation of the plaintiff's shares of stock. The complaint is that there was a discrimination by reason of the failure to deduct from the value of the shares of the entire value of the bank's tangible property, because "used and employed by it in the conduct and carrying on its business as a national banking association." And yet, in the face of the plain words of the Constitution and statutes, the clear language of the supreme court of California, and the absence of allegation or proof of actual discrimination, this court, by its opinion, strikes down the whole system of California for the taxation of shares of national banks.

But beyond and aside from the matters which I have considered, and conceding, for the purposes of the following suggestion, that the law of California providing for the taxation of shares of stock in national banks is invalid, still I insist that the decree of the court of appeals ought to be affirmed. This is an equitable suit brought in the United States court, where the distinction between law and equity is constantly enforced. Upon the theory of the opinion, the tax upon the shares of stock in the plaintiff bank was illegal. The statute of California imposing that tax was void. Now, there are two propositions which have entered into the jurisprudence of this court so thoroughly that they may be regarded as settled laws. First, that equity will not interfere where there is a plain, adequate, and complete remedy at law; and, second, that injunction will not issue to restrain the collection of a tax simply on the ground of its illegality. The first is not only the rule of the court of chancery in England, but it is the command of the Federal statute. Section 723, Rev. Stat. [U. S. Comp. Stat. 1901, p. 583], reads: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

This defense was pleaded by the defendant in his answer, the sixteenth paragraph of which reads as follows:

"And respondent further submits to this honorable court that complainant has a full, complete, speedy, and adequate remedy at

law against respondent for all causes of action, or causes of actions, stated or attempted to be stated in complainant's bill of complaint on file in this action; and he here claims the same benefit of the objection as if he had not demurred to the relief so sought."

Even if it had not been formally pleaded, the matter is one which this court of its own motion would consider and determine. As said in *Wright* v. *Ellison,* 1 Wall. 16, 22, 17 L. ed. 555, 557:

"But this is a suit in equity. The rules of equity are as fixed as those of law, and this court can no more depart from the former than the latter. Unless the complainant has shown a right to relief in equity, however clear his rights at law, he can have no redress in this proceeding. In such cases the adverse party has a constitutional right to a trial by jury. The objection is one which, though not raised by the pleadings nor suggested by counsel, this court is bound to recognize and enforce."

It is unnecessary to cite the many cases in this court in which this rule has been recognized, the latest being *Scottish Union & Nat. Ins. Co.* v. *Bowland,* the opinion in which has just been filed though reference may be made to the discussion by Mr. Justice Field in *Whitehead* v. *Shattuck,* 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276, and in *Scott* v. *Neely,* 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712, and by Mr. Justice Brown in *Wehrman* v. *Conklin,* 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 120. Now, in California there is a perfectly adequate legal remedy for cases of this nature. Section 3819 of the Political Code provides that "the owner of any property, . . . who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or, if a part only, what portion, and in either case the grounds upon which such claim is founded; and when so paid under protest the payment shall in no case be regarded as voluntary payment, and such owner may at any time within six months after such payment bring an action against the county in the superior court, to recover back the tax so paid under protest." Such a remedy has, in a case of the taxation of national bank shares, been held by this court adequate and complete, and sufficient to exclude the interposition of a court of equity. In *Dows* v. *Chi-*

*cago,* 11 Wall. 108, 20 L. ed. 65, which was a bill filed by the owner of shares of the capital stock of the Union National Bank of Chicago, to restrain the collection of a tax levied by that city upon his shares, we said (p. 112, L. ed. p. 67):

"The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And, except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

And this case was reaffirmed by the unanimous opinion of this court in the late case of *Pittsburgh, C. C. & St. L. R. Co.* v. *Board of Public Works,* 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90, in which the quotation I have just made is also quoted.

The second proposition to which I have referred has also been often decided. Out of the many decisions I refer to only two or three. *Dows* v. *Chicago,* 11 Wall. 108, 20 L. ed. 65, in which is this language (p. 109, L. ed. p. 66):

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked."

*State Railroad Tax Cases (Taylor* v. *Secor),* 92 U. S. 575, 23 L. ed. 663, in which is this (p. 614, L. ed. 673):

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

And in *Pittsburgh, C. C. & St. L. R. Co.* v. *Board of Public Works,* 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90, in which the rule is thus stated (p. 37, L. ed. p. 356, Sup. Ct. Rep. p. 92):

"The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

But it may be said that in the following cases this court has laid down an apparently different rule in respect to the taxation of national bank shares. *New York* v. *Weaver,* 100 U. S. 539, 25 L. ed. 705; *Pelton* v. *Commercial Nat. Bank,* 101 U. S. 143, 25 L. ed. 901; *Cummings* v. *Merchants' Nat. Bank,* 101 U. S. 153, 25 L. ed. 903; *Hill* v. *National Albany Exch. Bank,* 105 U. S. 319, 26 L. ed. 1052; *Evansville Nat. Bank* v. *Britton,* 105 U. S. 322, 26 L. ed. 1053; *Lander* v. *Mercantile Nat. Bank,* 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908. The first was a writ of error to the court of appeals of the state of New York, and, the mode of attack upon the law having been recognized by that court as proper, the question was not discussed here. In *Cummings* v. *Merchants' Nat. Bank, Pelton* v. *Commercial Nat. Bank* being decided on its authority, the right to an injunction was asserted. The case came from the circuit court of the United States for the northern district of Ohio, in which district the bank was located. In delivering the opinion of the court Mr. Justice Miller said on page 157:

"*But the statute of the state expressly declares* that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of Ohio, 1880, vol. 53, Laws of Ohio, 178, §§ 1, 2. And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, *where a statute of a state created a new right or provided a new remedy, the Federal courts will enforce that right, either on the common-law or equity side of its docket, as the nature of the new right or new remedy requires. Van Norden* v. *Morton,* 99 U. S. 378, 25 L. ed. 453. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced on the equity side of the court.

"The statute also answers another objection made to the relief sought in this suit, *namely, that equity will not enjoin the collection of a tax except under some of the well-known heads of equity jurisdiction,* among which is not a mere overvaluation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases.

"Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is *designed* to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

Two reasons are here stated to justify the exception to the ordinary rule in respect to injunctive relief. First, a state statute, and, second, a design on the part of the state authorities to discriminate. There is no statute of California making such special provision in reference to injunctions, and that reason for a departure from the general rule may be put one side. The other

implies an intent on the part of the legislature or assessing officials to discriminate. It does not mean simply that there has resulted a discrimination, but that one was intended. It is well known that in the early days of the national banking law there was a strong prejudice against it in different portions of the Union, and adverse legislation in the way of burdensome taxation was not uncommon, and it was because of that fact that the court permitted the exercise of the strong powers of equity. That I am right in this, and that there has never been an intent to apply a different rule to a national bank from that which has been in force in respect to other property, is made clear by the language of Mr. Justice Miller in a subsequent case, *German Nat. Bank* v. *Kimball,* 103 U. S. 732, 735, 26 L. ed. 469, 470. Delivering the opinion of the court, he says:

"An apparent exception to the universality of the rule is admitted in *People* v. *Weaver,* 100 U. S. 539, 25 L. ed. 705; *Pelton* v. *Commercial Nat. Bank,* 101 U. S. 143, 25 L. ed. 901, and *Cummings* v. *Merchants' Nat. Bank,* 101 U. S. 153, 25 L. ed. 903. It is held in these cases that when the inequality of valuation is *the result of a statute of the state designed to discriminate injuriously* against any class of persons or any species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments *combine together and establish a rule or principle of valuation,* the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject."

This ruling was somewhat like the action of the court in *Stanley* v. *Schwalby,* 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754. That was a case coming from a state court. Ordinarily when the judgment is reversed the order is to remand the case for further proceedings not inconsistent with our opinion; but, in view of action theretofore taken by the state court in the

case, we felt constrained to direct the very judgment which should be entered.

In *Lander* v. *Mercantile Nat. Bank*, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908, a decree dismissing the bill filed by the bank was affirmed. It is true in the opinion the merits of the bill were discussed, and nothing said about the right to maintain a suit in equity. Evidently the matter passed without consideration, and not unnaturally so, as the bill on its merits was dismissed.

In the case before us, whatever may be the effect of the statute in creating or opening the door to discrimination, no one can read it and say that there was an intent on the part of the legislature of California to discriminate injuriously against national banks. The statute is positive in its language that national bank shares shall be taxed and assessed as its other property, and there was beyond doubt an attempt on the part of the California legislature to cast only an equal burden of taxation on such shares. Of course, there ought not to be imputed to this court an intention to favor national bank property in the matter of taxation, and to lay down a rule for its benefit which is denied to all other property. So, were I wrong in my construction of the state statute, beyond any peradventure the decree of the circuit court of appeals ought to be affirmed and the bank remitted to its legal remedy.

I am authorized to say that the CHIEF JUSTICE, Mr. JUSTICE BROWN, and Mr. JUSTICE PECKHAM concur in this dissent.

# Supreme Court of the United States.

No. 44.—October Term, 1904.

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| The San Francisco National Bank, Appellant, *vs.* Washington Dodge, as Assessor of the City and County of San Francisco. | Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. |

[February 27, 1905.]

Mr. Justice White delivered the opinion of the Court.

The appellant bank sued to restrain the enforcement of State, county and city taxes, levied for the year 1900, upon shares of stock of the bank. Adequate averments were made to show equitable jurisdiction. (*Cummings* v. *National Bank*, 101 U. S. 153, 157; *Hills* v. *Exchange Bank*, 105 U. S. 319; *Lander* v. *Mercantile National Bank*, 186 U. S. 458.) The taxes were alleged to be in conflict with the law of the United States. (Rev. Stat. sec. 5219.)

The case was submitted upon the pleadings and an agreed statement of facts. A decree of dismissal was affirmed by the Circuit Court of Appeals for the Ninth Circuit. That court deemed that the cause was controlled by the reasoning of an opinion delivered in deciding a previous case, (*Nevada National Bank* v. *Dodge, Assessor,*) the opinion in which case is reported in 119 Fed. Rep. 57.

Before considering the contentions relied on we quote the text of the constitution of California directly relating to the subject in hand, and briefly advert to the legislation of that State which preceded the act under which the assailed tax was levied.

Section 1 of article XIII of the constitution of California provides:

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits of debts due to *bona fide* residents of this State."

Carrying out the command to provide for the ascertainment of the value of property to be taxed, it was enacted (Political Code, sec. 3627) that all taxable property shall be assessed "at its full cash value," and (Political Code, sec. 3617) that "the terms 'value' and 'full cash value' mean the

amount at which the property would be taken in payment of a just debt due from a solvent debtor."

Prior to 1881 shares of stock of all corporations were taxed, and section 3640 of the Political Code commanded that the market value of the stock of a corporation should be taken as the value of the shares for assessment. Where the shares of stock were taxed no tax was levied upon the corporate property. This was because the Supreme Court of California had decided that to tax both the stock and the corporate property would be double taxation. (*Burke* v. *Badlam*, 57 Cal. 594.)

In the year 1881 the general system of taxing shares of stock was abandoned, and a rule was put in force taxing the corporate property. Section 3608 of the Political Code, which embodied this change, was as follows:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation, which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock; nor shall any holder thereof be taxed therefor."

The act of 1899, under which the tax in this case was levied, amended the section just quoted, by providing that all property belonging to corporations shall be assessed and taxed "save and except the property of national banking associations, not assessable by Federal statute;" and by adding to the provision commanding that no assessment shall be made of shares of stock in any corporation the following words: "Save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute." To carry out the change made by the provision, just referred to two sections were added to the Political Code, viz., 3609 and 3610. Section 3608, as amended by the act of 1899, and the two new sections resulting from that act, are in the margin.*

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* 3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations (save and except the property of national banking associations, not assessable by Federal statute) shall be assessed and taxed. But no assessment shall be made of shares and stocks in any corporation (save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute.)

3609. The stockholders in every national banking association doing business in this State, and having its principal place of business located in this State, shall be assessed and taxed on the value of their shares of stock therein; and said shares

The first contention is that the law of 1899 is on its face in conflict with section 5219 of the Revised Statutes, because it taxes shares of stock in national banks and does not tax such shares in State banks and other State moneyed corporations. As it is patent that the State banks and corporations are taxed on their property, the proposition reduces itself to this: That the States may not pursue the method permitted by the act of Congress of taxing shares of stock in national banks unless the same method is employed as to the stock of State banks and other State moneyed corporations.

In *Davenport National Bank* v. *Board of Equalization*, (123 U. S. 83,) it was decided that the provision of section 5219 of the Revised Statutes, authorizing the taxation of shares of stock in national banks, but exacting that the tax when levied should be at no greater rate than that imposed on other moneyed capital, did not require the States, in taxing their own corporations, "to conform to the system of taxing national banks upon the shares of their stock in the hands of their owners."

True it is in the Davenport case it was also decided that the prohibition in the act of Congress of a higher rate of taxation of shares of stock in

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shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town or county, or not; but in the assessment of such shares each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provisions of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California. In making such assessment to each stockholder there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individul citizens of this State.

3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholder of such assessment shall be necessary for the purpose of this act. And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid.

national banks than on other moneyed capital operated to avoid any method of assessment or taxation, the usual or probable effect of which would be to discriminate in favor of State banks and against national banks. True also is it that in the same case it was held that, even where no such discrimination seemingly arose on the face of the statute, nevertheless, if from the record it appeared that the system created by the State in its practical execution produced an actual and material discrimination against national banks, it would be the duty of the court to hold the State statute to be in conflict with the act of Congress, and therefore void.

As, then, no conflict necessarily arises between the act of Congress and the State law, solely because the latter provides one method for taxation of State banks and other moneyed corporations and another method for national banks, it follows that the contention that the State law for that reason is repugnant to the act of Congress is without merit. And this brings us to consider the contention of the appellant, which we think was embraced in the pleadings, which was expressly covered by the stipulated facts, the overruling of which was assigned as error in the Circuit Court of Appeals and in this court, and was elaborately discussed by both parties in the argument at bar, viz., that irrespective of the face of the State law, that law is void because of a discrimination against national banks, within the principles settled in the Davenport case.

To determine this latter contention requires an analysis of the two systems which the law of California enforces, in order that the two may be accurately compared.

Under the law the shares of national banks must be valued at their "full cash value," which the statute defines to mean the amount at which they "would be taken for a just debt due from a solvent debtor." These words are but synonymous with the requirement that in assessing shares of stock their market value must be the criterion. This is the case, for, eliminating exceptional and extraordinary conditions, giving an abnormal value for the moment to stock, it is apparent that the general market value of stock is its true cash and selling value. That such is the meaning of the words in the legislation of California is indisputable, in view of the provision of section 3640 of the Political Code, which made market value the rule for assessing shares of stock during the period when the taxation of shares of stock generally prevailed, and that such requirement was mandatory was in effect held by the Supreme Court of California. (*Miller* v. *Heilbron*, 58 Cal. 133, 138.)

What, then, was embraced in the assessment of the shares of stock at their full cash or selling or market value? It embraced not only the book value of all the assets of the corporations, but the good will, the dividend-earning power, the ability with which the corporate affairs were managed, the confidence reposed in the capacity and permanency of tenure

of the officers, and all those other indirect and intangible increments of value which enter into the estimate of the worth of stock and help to fix the market value or selling price of the shares. Considering this subject in *Adams Express Company* v. *Ohio*, (166 U. S. 211,) the court said:

"The capital stock of a corporation and the shares of a joint stock association represent not only tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern."

And in *Pullman Company* v. *Transportation Company*, (171 U. S. 138,) this was reiterated. The court, after observing that while the franchise was one of the things entering into the computation of market value of shares of stock, said (p. 154):

"The probable prospective capacity for earnings also enters largely into the market value, and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views."

That this doctrine is the rule in California is clearly shown by *Bank of California* v. *San Francisco*, (142 Cal. 246,) for in that case the court, speaking of such elements of value as "dividend or profit-earning power or good-will," said (p. 289):

"In this connection it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders."

The State banks and other corporations are assessed on their property. Conceding that every species of property is assessed which is specifically enumerated as taxable in the State constitution, it does not follow that the assessment of property as such includes good will, dividend-earning power, confidence in the ability of the management, and all those other intangible elements which necessarily enter into the cash or selling value of shares of stock. As said in the passage already quoted from the Pullman case, *supra*, such elements "may enhance the value of the shares of stock in the market, yet they do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views." In the argument at bar no law of the State was referred to requiring that the assessing officers in valuing the property of a corporation should assess as property its good will, its dividend-earning power, the confidence reposed in its officers, etc. From this analysis it results that in the one case, that of national banks, not only the value of all the tangible property but also the value of all the intangible elements above referred to is assessed and taxed, whilst in the other case, that of State banks and other moneyed corporations, their prop-

erty is taxed, but the intangible elements of value which we have indicated are not assessed and taxed, the consequence being to give rise to the discrimination against national banks and in favor of State banks and other moneyed corporations forbidden by the act of Congress.

In the argument at bar this conclusion, it is insisted, is avoided because, whilst under the text of the State statutes it may be that all the elements of value which are included in the assessment of shares of stock are not *eo nomine* assessed against State banks and other moneyed corporations as property, they are, nevertheless, assessed against such corporations under the denomination of "franchise," the duty of the assessing officer to do so being imperative, as the result of the interpretation given to the taxing law by the Supreme Court of the State. The proposition is thus stated in the argument of counsel:

"Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of the corporation is greatly in excess of the value of its property, other than its franchise. This fact was called to the attention of the State court, which recognized the force of this suggestion, and held the Constitution and laws of the State require the assessment and taxation of the franchise of the corporation, and that its value, for the purpose of such assessment and taxation was properly ascertained by deducting from the market value of its stock the value of its corporate property and assessing the remainder as franchise."

It may be conceded that if the statutes have been interpreted by the Supreme Court of the State as thus asserted, and that as so interpreted they have been applied by the assessing officers, there would be an end to the discrimination which we have seen arises from the consideration of the result of the statutes when not so interpreted.

The question then is, do the decisions of the Supreme Court of California, as contended, place the positive duty on the assessor of including in an assessment of the franchises of State corporations all the elements of value which form part of the market or selling value of shares of stock?

Three cases are cited to sustain the proposition, viz., *San Jose Gas Company* v. *January*, (57 Cal. 614;) *Spring Valley Waterworks* v. *Schottler*, (62 Ib. 69,) and *Bank of California* v. *San Francisco*, (142 Ib. 276.)

Before coming to consider the last case cited, which is the one principally relied upon, we dispose of the two others by saying that they do not support the proposition. The first simply decided that where a part of a tax was asserted to be illegal and a part was admitted to be valid, the duty existed to pay the confessedly legal part to justify relief concerning the portion claimed to be illegal. The second case but decided that the franchises of corporations were taxable as property, and where a corporation enjoyed other franchises than the right to exist as a corporation, and the board of equalization in assessing such franchises had treated them as

equivalent in value to the selling value of the capital stock, the courts had no power to interfere with the discretion lodged in the assessing officers. In the last cited and latest decided case, *Bank of California* v. *San Francisco*, the controversy was this: The Bank of California was assessed on its property. The difference between the value of such property and the cash or selling or market value of the shares of stock of the corporation was $2,943,006.92. The franchise, instead of being assessed for this amount, was valued only at $750,000. This valuation was resisted by the bank, upon the ground that it was so large that it must have included good will, dividend-earning capacity, etc., which, it was asserted, could not under the law be embraced in an assessment of franchises. The court elaborately reasoned (there being two dissenting judges) that in view of the power of the assessors to value property it "could not say" that the assessing officers had transcended their authority in making the valuation complained of. Speaking of the duty of the assessing officers, it was said (p. 288):

"The duty of making the valuaton was cast upon the assessor. The method of arriving at the valuation, the process by which his mind reached the conclusion (in cases where, as here, it is not pretended that he acted fraudulently or dishonestly) is matter committed to his determination. . . . This appears to be determinative of the contention here made. . . . (p. 289.) Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property, viz., $2,943,096.92—was the value of the franchise, the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and were we at liberty to review the judgment of the assessor and of the board of equalization upon those matters, we could not say that an assessment of $750,000 thereon is unjust, or that it includes such elements as dividend or profit-earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation."

After pointing out that these elements entered into the assessment of shares of stock at their market value, it was observed (p. 289):

"It is clear that if the laws of the State properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

In other words, the court simply declared that *if* the law of the State properly expressed the purpose to tax everything of value, the assessor had a discretion to consider what was the selling value of shares of stock in fixing the value of the franchise. Instead of supporting the contention that the law obliged the assessor to attribute to the franchise the value of those intangible elements which it was conceded were embraced in the assessment of shares of stock, the reasoning of the opinion is to the con-

trary. As the cash, selling or market value of the stock in the case before the court was conceded to have been nearly three million dollars greater than the tangible property assessed to the corporation, and the assessor had valued the franchise not at that sum, but at only $750,000, it is patent that if the law of California had been what it is now asserted the court held it to be, that the claim that there was an overvaluation of the franchise would have been so frivolous as to require only a statement of the law to decide against the claim of overvaluation.

But the court made no such statement. On the contrary, it stated its inability to judicially declare that an assessment was extravagant and grossly unjust which was more than two millions lower than it should have been if the law imposed the obligation on the assessor of valuing the franchise by the difference between the value of the tangible property assessed and the cash or selling value of the shares of stock. This inability to give relief was placed solely upon the discretion which the law lodged in the assessor. But this interpretation of the statute serves only to further demonstrate the discrimination which has been previously pointed out. This result is made clear by comparing the discretion lodged in the assessor in valuing the franchise of State banks or other moneyed corporations with the duty resting on him as to the valuation of shares of national banks. The wide difference between the *discretion* on the one hand and the *duty* on the other will be additionally demonstrated by a consideration of the discrimination against national banks which has arisen in the practical execution of the statutes.

In the agreed statement of facts it was admitted that there are in the State of California one hundred and seventy-eight commercial (or State) banks, possessing a vast amount of capital, eighteen of which were located in San Francisco. And, to quote from the statement, "that the manner in which franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30, 1901, by the assessor of the city and county of San Francisco, is illustrated by the case of the Bank of California, a banking corporation organized under the laws of the State of California." The assessment in question, which it is thus declared in the statement of facts is illustrative of the other assessments against State banks, was the one which was involved in the controversy decided in the Bank of California case, *supra*. It is then recited in the agreed statement that the total property resources of the Bank of California, correcting a misprint in the record, were $5,156,903.08; and that the market or selling value of its capital stock was $8,100,000, a difference of $2,943,096.92; and that, deducting from the resources of the bank certain exemptions, the bank was assessed for property at $2,311,774. To this last mentioned sum was added for franchise tax, not the difference between the value of the property and the selling value of the stock, which, as stated, was nearly three millions of

dollars, but only $750,000. It is insisted in argument that this statement shows but a single case of undervaluation of a State bank by the assessors, and therefore does not justify the conclusion that in the exercise of their discretion the assessors had not generally, as to State banks and corporations, valued the franchises at less than the difference between the value of the property taxed and the market or selling value of the stock. But this contention disregards the fact that, by the agreed statement, it was expressly admitted that the assessment in question was illustrative of the assessments upon the other State banks and moneyed corporations. In view of the issues in the cause, as to which the facts were agreed, to say that the assessment in question only illustrated the case of the Bank of California would require us to disregard the agreed statement.

Finally, it is contended that, even if the State banks and other State moneyed corporations were assessed as illustrated by the valuation placed on the Bank of California, the complainant national bank has no reason to complain because the assessment put upon its shares of stock was relatively no higher than that put upon the Bank of California, and therefore no discrimination was occasioned. This is predicated upon the fact that the value per share affixed to the stock of the complainant national bank was not higher, having sole reference to the value of the stock as shown by the book value of the assets, and, considering allowable deductions, than was the assessment put upon the Bank of California, considering alone the same elements. But there is no proof whatever that the stock of the complainant bank had a market or selling value higher than the value affixed to it by the assessor; and the items which were made the basis of the assessment against the stock are declared in the agreed statement to be the entire assets of the bank, and in the argument at bar on behalf of the assessor the value of the shares of stock of the bank in excess of their book value is assumed to have been only nominal. The proposition, therefore, comes to this, although the complainant national bank was assessed at the full value of its stock, there was no discrimination in favor of the State bank, albeit there was a difference in excess of two millions of dollars between the value put upon the property and franchise of the State bank and the sum which should have been levied against it, if all the elements had been assessed which enter into the value of shares of stock. And, thus analyzed, the contention is again reducible to this proposition, that where property of one person worth a given amount is assessed for its full value no discrimination in favor of another results when the latter is assessed for a sum greatly below the value of the property assessed.

What has just been said disposes also of the contention that if the national bank had been assessed under the State law by the rule applied to State banks it would have had affixed to its property a slightly higher valuation than was given as the value of the shares of its capital stock.

Without stopping to point out the error in the calculation by which this result is supposed to be demonstrated, it suffices to say that the contention would have merit only in the event that the property and franchise of all State banks had no higher value than the book value of the shares of stock. The fallacy underlying the whole contention cannot better be made clear than by the mere reiteration of the statement that, under the facts as agreed, it is obvious that the shares of stock of the national bank were assessed for all they were worth under the rule of market or selling value, whilst the State bank was only assessed for $750,000 above the book value of the stock, although the cash, selling, or maket value would have required an assessment of nearly three millions of dollars.

Many contentions were argued at bar involving the assertion that the State law was invalid because of deductions of debts or exempt property which, it was asserted, the law allows to State banks and other moneyed corporations on an assessment of their property and does not allow holders of shares of stock in national banks. Most of these contentions are in effect disposed of by the consideration which we have given to the proposition that the State law was void simply because it established different methods of taxation as to the two classes of corporations. In so far as the contentions referred to are not in effect disposed of by our conclusions on that subject, we content ourselves with saying that we think all such propositions were rightly decided by the court below to be without merit, for the reasons expressed in the opinion delivered by that court in the Nevada Bank case, to which the court referred and upon which it placed its rulings. We decide this case solely upon the record before us. Our conclusion, therefore, does not deny the power of the State of California to assess shares of stock in national banks, provided only the method adopted does not produce the discrimination prohibited by the act of Congress. From this, of course, it would follow that if the statutes of California, either from their text or as construed by the highest court of that State, compelled the assessing officers in the valuation of the property of State banks and other State moneyed corporations to include all those elements of value which are embraced in the assessment of shares of stock in national banks so that there would be an equality of taxation as respects national banks, the discrimination which we find to exist under the present State of the law of California would disappear.

*The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause is remanded to the Circuit Court for further proceedings in conformity with this opinion.*

# Supreme Court of the United States.

No. 44.—October Term, 1904.

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| The San Francisco National Bank, Appellant, vs. Washington Dodge, as Assessor of the City and County of San Francisco. | Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. |

Mr. Justice Brewer, with whom the Chief Justice, Mr. Justice Brown and Justice Peckham concur, dissenting.

I am unable to concur in the foregoing opinion, and, believing that a grievous wrong is done to the State of California, will state the reasons for my dissent. Section 5219, Rev. Stat., prescribes the conditions and limitations of State taxation of national banks. In reference to it we said in *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 669:

"This section, then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank."

By the section two restrictions, and two only, are placed on the power of the State to tax the shares of stock: "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

No uniform rule is prescribed by Congress as to the mode of assessment or the manner in which the State shall impose its burden of taxation on the shares of stock in national banks. Each State is left to determine that according to its own judgment. All that is demanded is that in fact neither the rate of tax nor the assessment shall discriminate against national banks, and that the property subject to taxation shall not be burdened in excess of the burdens cast upon other moneyed capital. *Davenport Bank* v. *Davenport*, 123 U. S. 83.

The mandate of section 1 of the constitution of California is:

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership."

Thus the constitution requires the taxation of all property and a taxation in proportion to its value, and defines property as including everything capable of private ownership. Certainly, if the mandate of the Constitution is expressed in the statutes the shares of stock in national banks will be subjected to the same rate of taxation as all other property in the State, including therein moneyed capital. It must, therefore, be held that the legislation respecting the taxation of national bank shares is in defiance of the State constitution before it can be adjudged in conflict with the equality provision of section 5219, Rev. Stat. Or, in other words, that the legislature of California disregarded the requirements of their own constitution in order to subject to taxation property protected by Federal laws.

The legislation of California in this regard is found in section 3608 of the Political Code, as amended in 1899, and two additional sections enacted in that year, numbered 3609 and 3610:

"3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations save and except the property of national banking associations not assessable by Federal statute shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute.

"3609. The stockholders in every national banking association doing business in this State, and having its principal place of business located in this State, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town, or county, or not; but in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provision of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California. In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capitol stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State.

"3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written

notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this act. And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid."

The rule of valuation is prescribed by the fifth subdivision of section 3617 of the Political Code, which provides that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor." It is true that prior to 1881 market value was made the rule of valuation, but the section prescribing that rule was, so far as it applied to national bank shares, adjudged void by the Supreme Court of the State, (*Miller* v. *Heilbron*, 58 Cal. 133,) and wholly repealed by the legislature, (Stat. 1881, p. 59,) and in lieu of that the present rule of valuation established. But the rule of valuation is not so material, and doubtless an established market value would be the amount at which property would be taken in payment of a just debt due from a solvent debtor. The main thing is that the same rule of valuation shall be applied to the assessment and taxation of national bank shares as of other moneyed capital. And the express declaration of section 3609 is that the shares in national banks "shall be valued and assessed as is other property for taxation."

From the sections quoted it appears that the method of reaching the property of State corporations for purposes of taxation is by treating the corporation as owner of all and casting the burden of taxation directly upon it, while on the other hand, in obedience to the requirements of the Federal statute, taxation in respect to national banks is limited to an assessment and taxation of the shares of stock. But there is no discrimination if the same property is reached by each method and by each subjected to the same rule of valuation. By section 3608 all the property of State corporations must be assessed and taxed, and the word "property" is defined by the constitution to include not merely tangible assets but also "franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Everything, therefore, which is a part of the property of a State corporation is subject to assessment and taxation. No other or larger burden is cast upon shares of national banks, and surely there can be no discrimination when the entire property in the one instance is taxed as a whole to the corporation and in the other instance subdivided and taxed to the stockholder. The whole is neither less

nor more than all its parts. But it is said there is no specific command to include in the property of a State corporation the good will, dividend-earning power and the like, and that they are necessarily included in the selling value of the stock of any corporation. It is true, these items are not in terms mentioned, but neither are desks and furniture. The language is general, so general that it includes everything, not excepting good will, dividend-earning power and the like, for they are "capable of private ownership." They belong to the corporation. There is no good will in a share of stock over and above the good will which belongs to the corporation, and if the corporation sells and conveys all that it possesses "capable of private ownership," it sells and conveys its good will, and there is nothing left of good will or anything else belonging to the stockholders. This is so plain that he who runs may read. It is hardly necessary in a matter so clear to refer to the decisions of the Supreme Court of California, and yet they are direct upon the proposition. Thus in *Burke* v. *Badlam*, 57 Cal. 594, the court said (pp. 601, 602):

"Now, what is the stock of a corporation but its property, consisting of its franchise and such other property as the corporation may own? Of what else does its stock consist? If all this is taken away, what remains? Obviously nothing. *When, therefore, all of the property of the corporation is assessed—its franchise and all of its other property of every character—then all of the stock of the corporation is assessed, and the mandate of the constitution is complied with.* This property is held by the corporation in trust for the stockholders, who are the beneficial owners of it in certain proportions called shares, and which are usually evidenced by certificates of stock. The share of each stockholder is undoubtedly property, but it is an interest in the very property held by the corporation. It is his right to a proportionate share of the dividends and other property of the corporation—nothing more. When the property of the corporation is assessed to it, and the tax thereon paid, who but the stockholders pay it? It is true that it is paid from the treasury of the corporation before the money therein is divided, but it is substantially the same thing as if paid from the pockets of the individual stockholders. To assess all of the corporate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each. As well might it be contended that the property of a partnership should be assessed to the firm, and in addition, that the interest of each partner in the firm property should be assessed to him individually. If I have an interest in partnership property, my interest therein is property. It is the right I have to share in the profits and property of the firm, in proportion to the interest I own. But my property rights are confined to the property held by the firm, just as the property rights of the stockholder in the corporation are confined to the property held by the corporation. In the case of the partnership, take away all the property of the firm, and I have no longer any property as a partner. In the case of the corporation, take

away all of its property, which, it must be remembered, includes its franchise, and the shareholder no longer has any property. The cases are parallel. If in the one case it is competent to assess to the corporation all of the property held by it, and to the individual stockholders the respective interest owned by each therein, so must it be competent to assess to every partnership the property held by the firm, and to each indivdual partner his interest therein. It is clear to our minds that in the one case the partner and in the other the stockholder would be compelled to pay twice on the same property, which is neither required nor permitted by the constitution. *In the case of the corporation to which we have referred the legislature has declared that all of the property held by such corporations shall be assessed to them. It has not attempted to exempt any property from taxation not exempted by the constitution itself, and of course could not do it if it had. It has only said that the property shall be assessed to the corporation, and shall not be again assessed for the same tax. This it had the right to say.*" (Italics in this and succeeding quotations are mine.)

It will be seen from this quotation that the court places partnerships on the same basis as corporations. If the partnership sells out its property, including its good will and its profit-earning power, which are part of its property under the constitutional definition of property, there is nothing left to the separate partners. The whole thing has passed to the purchaser, and in the same way when a corporation makes a sale. And to hold that the good will and profit-earning power must be specifically mentioned is to hold that the constitutional definition of property is insufficient; that good will and profit-earning power are not "capable of private ownership," or do not belong to the corporation. *Burke* v. *Badlam* was reaffirmed in *Bank of California* v. *San Francisco*, 142 U. S. 276, decided since the decision of this case by the Court of Appeals. This case is very instructive. It was an action brought by the plaintiff, a State bank, to have an assessment of its franchise declared illegal and void, and to recover the amount paid by it under protest as taxes thereon. The contention of the plaintiff was that it did not own or possess any franchise whatever, that the only franchise in any way connected with it was the corporate franchise, the franchise of being a corporation, which was the property of the stockholders and not assessable or taxable to the corporation. It appears from the opinion that the assessor found that the aggregate value of the tangible property of the bank was $5,156,903.08, that the market value of all the shares of the capital stock was $8,100,000, and the difference between the two was by him ascertained and determined to be the value of the franchise of the bank. The State was not challenging the assessment, and of course no inquiry was made as to the propriety of an increase in the valuation.

In reply to the contention of the plaintiff the court uses this language:

"It was said by the Supreme Court of the United States, in *Society for Savings* v. *Coite*, 6 Wall. 594, 606: 'Corporate franchises are legal entities vested in the corporation itself as soon as it is *in esse*. They are

not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation, upon the possession of its franchises, and whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises.'

"If this corporate franchise is assessable as property, then, that it must be assessed to the corporation instead of the members or stockholders is clearly settled in this State by the decision in *Burke* v. *Badlam*, 57 Cal. 594, *where it was held that a stockholder could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate.* (See also Pol. Code, sec. 3608.")

Again, referring to *Burke* v. *Badlam, supra*, the court said (p. 285):

"This case necessarily involved the question as to the constitutionality of section 3608 of the Political Code, prohibiting the assessment of shares of stock to the holders thereof. Such shares being undoubtedly property, unless they were otherwise assessed, the section was clearly unconstitutional, in view of the provision of the constitution requiring all property to be taxed. *According to the decision of the court they were under the law to be otherwise assessed*—i. e., *everything represented by the certificates was to be assessed to the corporation.*"

And again, on p. 289:

"Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property—viz., $2,943,096.92—was the value of the franchise, *the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and were we at liberty to review the judgment of the assessor and the board of equalization upon those matters, we could not say that an assessment of* $750,000 *thereon is unjust, or that it includes such elements as dividends or profit earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation. In this connection it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the State is at liberty to adopt—in fact, bound to adopt—unless such shares are otherwise covered by the assessment of the property of the corporation.*

"It is clear that if the laws of this State properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

I have made these extensive quotations from the opinions of the Supreme Court of California, for in cases like this we follow the construction placed by the highest court of the State upon its statutes. Obviously, that court construes them as including within the corporate property the aggregate value of all the shares of stock and that while they forbid the assessment and taxation of shares of stock in a State corporation, they require that all the value represented by those shares of stock be assessed and taxed against the corporation; so that when you ascertain the value of a single

share of stock and multiply that by the number of shares in the corporation you have the value of the corporate property subject to taxation.

After declaring that the prohibition of the assessment and taxation of shares was clearly unconstitutional, unless they were otherwise assessed, it added, referring to the case of *Burke* v. *Badlam*, "according to the decision of the court they were under the law to be otherwise assessed, *i. e.*, everything represented by the certificates was to be assessed to the corporation." Now, if as claimed, the shares represent not merely the tangible property but the franchise, the dividend earning power, then, as stated, "everything represented by the certificates was to be assessed to the corporation." And this language is followed by the declaration, referring to dividends, profit, earning power, good will, etc.: "In this connection it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the State is at liberty to adopt—in fact bound to adopt—unless such shares are otherwise covered by the assessment of the property of the corporation." Reference is made to the use of the word "if" in the last paragraph of the quotation, as though that implied a doubt as to the meaning of the State statutes. But surely that cannot be, in view of the prior declaration in the same opinion, that "everything represented by the certificates was to be assessed to the corporation." The paragraph is to be read as though it said that provided the laws of the State properly express the intention, as we have already held that they do, then the true value of the shares is an important element in determining the value of the corporate property. The same word "if" is used at the commencement of the second paragraph of the quotation "if this corporate franchise is assessable as property," in like manner, for the word "franchises" is found in the constitutional definition of property, the paragraph preceding "if" declares that "the corporation itself has a legal interest in such franchises," and the very paragraph says that "the assessment of all the property of the corporation covered everything represented by the certificate." Certainly it seems to me there is no justification in torturing this word "if" as overthrowing all the clear declarations of the court, as well as implying a destruction of the plain letter of the statutes.

But great reliance is placed upon the admission in the agreed statement of facts, "that the manner in which franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30, 1901, by the assessor of the city and county of San Francisco, is illustrated by the case of the Bank of California, a banking corporation organized under the laws of the State of California." In the assessment of that bank the assessor did not add to the value of the tangible property the difference between that value and the market value of the capital stock, but a sum very much

less. A tabular statement is also annexed, showing the financial condition during the year of the 178 State banks of California. It might be sufficient to say that the stipulation is satisfied by a conclusion that the assessor in assessing State banks generally added to the value of the tangible property something on account of the franchise—we are not compelled to infer that to the valuation of the tangible property of each bank he added $750,000, or even that he failed to add the full difference between the value of that property and that of the stock. Indeed, it does not appear from the tabular statement that the market value of the shares in a single State bank in California exceeded the value of its tangible property. So that, so far as that evidence goes, the only case in which there was any franchise value to be added was that of the Bank of California. But more significant is this: It appears from the agreed statement that the assessment complained of in this case was made in the following way:

"The defendant in making his assessment fixed the value of the shares for taxation at $104.35 each, and arrived at that valuation in the following manner: He added to the capital stock of the bank, $500,000, its undivided profits amounting to $77,260, deducted the face value of United States bonds held by it, $50,000, and the value of its furniture, $5,500, leaving $521,760 as the total assessable value, and dividing that by the number of shares made the assessable value of each share the sum above stated."

In other words, the only assessment against the plaintiff's shares was based upon the value of the tangible property. Not a dollar was added to the valuation on account of franchise, good will, or dividend-earning power, or anything of that kind. Or, to put it in another form, the assessment of the State bank added to the value of the tangible property something for the value of the franchise, the assessment of the plaintiff stopped with the tangible property, and yet it is held that there was an actual unjust discrimation against the plaintiff. And how is this conclusion reached? By assuming that the shares in the plaintiff bank had no value above the value of the tangible property. But this is a mere assumption. A more rational guess would be that the shares of stock in a bank whose undivided profits were over fifteen per cent of its capital had a value much above the par value of its stock or the value of its tangible property. And can it be that the whole system of the legislation of a State in respect to the taxation of national banks can be stricken down upon an unfounded assumption that the shares of a given national bank were worth no more than its tangible property? If the complaint was of an actual discrimination it was a part of the plaintiff's duty to prove it, and show that its shares had no value above that of the tangible property, and would not "be taken in payment of a just debt due from a solvent debtor" at a larger sum. The most elementary rule of judicial

proceedings is that a party to make out his cause of action must prove, not assume, the existence of all essential facts.

But I need not rest upon the omission of proof. There is no allegation of any discrimation based upon such difference of valuation. The eleventh and twelfth paragraphs of the complaint state the wrongs on account of which relief is sought. In order that there may be no misunderstanding of the full scope of the causes of action alleged I quote these paragraphs entire:

"Eleventh.—That the said assessment and taxation, so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator, will be in violation of, and repugnant to, the provisions of sections 5219 and 1977 of the Revised Statutes of the United States, in that the said assessment and taxation will be at a greater rate than is or will be assessed upon other moneyed capital in the hands of individual citizens of the said State of California. And in that behalf your orator shows that under and by virtue of the laws of the said State of California, all shares of stock in corporations organized under the laws of the said State and amounting to more than the sum of two hundred million dollars ($200,000,000), and especially in corporations organized under the laws of the said State for the purpose of banking, all shares of stock thereof amounting to more than the sum of thirty-five million dollars ($35,000,000), are expressly exempt from assessment and taxation, and the same are not subject thereto, and that the respondent has not assessed and will not assess, for the said fiscal year ending June 30th, 1901, and does not intend to assess, to the holders of shares in corporations organized under the laws of the said State of California, the value of the same, or to collect from such shareholders any taxes on said shares or the value thereof.

"And your orator further shows that the said pretended assessment and taxation so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator will be in violation of, and repuganant to, the provisions of said section 5219 of the Revised Statutes of the United States, in that the said taxation will be at a greater rate than will be assessed upon any other moneyed capital in the hands of individual citizens in the State of California. And in that behalf your orator further shows that in assessing and taxing the said shares of the capital stock of your orator no deduction will, or can legally, be made from the valuation of said shares, or any of them, of debts unsecured by deed or trust, mortgage or other lien on real or personal property due or owing by the stockholders of your orator, or by any of them, to *bona fide* residents of the State of California; and that in assessing and taxing other moneyed capital in the form of solvent credits unsecured by deed of trust, mortgage or other lien on real or personal property, due or owing to, or in the hands of, individual citizens in said State of California, the respondent does and will make a deduction from said credits, under and by the constitution and laws of the State of California, of the debts unsecured by trust deed, mortgage or other lien on real or personal property as may be owing by such individual citizens, or by any of them, to *bona fide* residents of the State of California, and that said threatened

assessment and taxation of the shares of your orator is, and will be unjust, unlawful and illegal, and will discriminate against and upon such shares and against and upon the persons owning and holding the same, and will compel them to sustain and bear more than their just share and burden of the taxes of the said State of California. And in this behalf your orator further avers that it is informed and believes, and upon such information and belief states the fact to be, that the amount of moneyed capital in the city and county of San Francisco in said State of California on the first Monday of March, 1900, to wit, on March 5th, 1900, at noon of said day, invested by banks and bankers, having their principal place of business in said city and county, and residents therein, in unsecured solvent credits, and from which, under the constitution and laws of said State, unsecured debts can be deducted, was the sum of $14,074,561; and on the day and year last aforesaid the amount of moneyed capital in the State of California, other than in the said city and county of San Francisco, invested by banks and bankers in unsecured solvent credits, and from which, under the constitution and laws of said State, unsecured debts can be deducted, was the sum of $7,589,302; that on the day and year last aforesaid said banks and bankers at said city and county of San Francisco had debts unsecured by trust deed, mortgage or other lien on real or personal property owing by such banks and bankers in said city and county, amounting to the sum of $36,710,062; and that on said day last aforesaid the amount of debts unsecured by trust deed, mortgage or other lien on real or personal property owing by said banks and bankers in the State of California, other than in the said city and county of San Francisco, was the sum of $32,400,304; that the anount of moneyed capital invested in such solvent credits by such banks and bankers on the day and year last aforesaid, in said city and county of San Francisco and in said State of California, as compared with the amount of moneyed capital invested in the shares of the capital stock of your orator, is so large and substantial that the assessment and taxation of the shares of the capital stock of your orator without deducting therefrom, and without being able to deduct therefrom, debts unsecured by trust deed, mortgage or other lien on real or personal property, as may have been owing by the respective holders of the shares of the capital stock of your orator on the day and year last aforesaid, will be an illegal and unjust discrimination against the owners and holders of the shares of the capital stock of your orator, and will make the taxation of said shares of stock at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens in the State of California, and particularly in the city and county of San Francisco, in said State. And in this behalf your orator further avers that the said solvent credits so held as aforesaid by banks and bankers in the said city and county of San Francisco and in the said State of California are moneyed capital in the hands of individual citizens of the State of California, which enter into competition for business with your orator.

"Twelfth.—That in the making of the said assessment of the said shares of the capital stock of your orator the respondent will not proceed in the manner directed by the said act of March 14th, 1899, in this: That the said respondent, as hereinbefore set out, will ascertain and determine the value of each of the shares of the capital stock of your orator to be the sum of

$115,452, and will deduct therefrom the sum of $11.10 per share as the proportionate amount per share of the value of the United States bonds held by your orator to secure its circulation, and of its furniture, and will, as hereinbefore set out, assess to the stockholders the sum of $104.36 per share as the value of each share of said capital stock by the said respondent claimed to be subject to assessment and taxation under the provisions of said act of March 14th, 1899, and that the respondent will wholly fail and refuse to make any other or further deductions from such ascertained value of said shares, in order to determine the assessable value thereof, whereas, by the provisions of said section 3609 of the Political Code of the State of California, under and in pursuance whereof the respondent has threatened and intends to make the said assessment and will proceed to demand and will attempt to collect the taxes aforesaid, he was and is required to deduct from the value of each share of the capital stock of your orator, such sum as is in the same proportion to such value as the total value of the real estate and property of your orator exempt by law from taxation bears to the whole value of all the shares of the capital stock of your orator. That on the first Monday of March, 1900, to wit, on March 5th, 1900, at twelve o'clock M. of said day, your orator had not, and thence hitherto has not had, nor has it now, any real estate, and as in paragraph 'Eighth' hereof averred, all of the property of your orator consisted on said day and at said time, and has thence hitherto consisted, and does now consist of its bonds, money on hand, credits, furniture and other personal property, and on said day and at said time the same constituted and were, and thence hitherto have been, and now are, the assets of your orator, and were and are used and employed by it in the conduct and carrying on its business as a national banking association under and by virtue of the provisions of the act of the Congress of the United States known as the National Banking Act, and were and are exempt by law from assessment and taxation. That if deduction of all the property of your orator exempt from assessment and taxation as last aforesaid were made to each stockholder in assessing said stock there would remain nothing of value subject to assessment and taxation, and that the pretended assessment and taxation of said shares at said value of $104.36 per share would be based wholly upon supposed and fictitious property and upon property exempt by the Constitution and laws of the United States from assessment and taxation."

The first of these paragraphs alleges a violation of the Federal statute in the taxation of plaintiff's shares of stock, because under and by virtue of the laws of California all shares of stock in State corporations are exempt from assessment and taxation, and the assessor does not intend to assess to the holders the value of those shares. But, as repeatedly held, a mere difference in the methods of State and national bank taxation is not repugnant to the act of Congress. The balance of the paragraph is substantially a charge of a discrimination by reason of a failure to deduct debts. But that, it is conceded in the opinion of the court, may be put one side—a concession undoubtedly compelled by the facts as agreed upon, for an opportunity was given to each stockholder in the plaintiff bank to have any debts deducted, and no one of them sought to avail of this privilege.

The other paragraph charges a discrimination and that the assessor ascertained the value of the shares of the capital stock of the plaintiff at the sum of $115.452 and deducted therefrom the sum of $11.10 per share as the proportionate share of the value of United States bonds held by the bank; that he refused to make any further deductions, although the various items of property held by the bank, consisting of bonds, moneys, credits, etc., "were and are used and employed by it in the conduct and carrying on its business as a national banking association, under and by virtue of the provisions of the act of Congress of the United States, known as the National Bank Act, and were and are exempt by law from taxation." The complaint here is that the tangible property of the national bank is wholly exempt from taxation because used for the purpose of carrying on the banking business, and as the only assessment of plaintiff's shares was based upon the value of the tangible property the entire assessment was void. Now it is not pretended in the opinion of the court, nor can it be successfully claimed in view of prior decisions of this court, that shares of stock in a national bank are subject to taxation to only the extent of the excess of their value above that of the tangible property of the corporation and yet that is the burden of plaintiff's complaint. I have made this extensive quotation because it is apparent therefrom that the matter which, in the judgment of the court is sufficient to overthrow the law of California in respect to the taxation of national banks, was not charged or complained of by the plaintiff. If the plaintiff neither alleges nor proves any discrimination in the matter of valuation I cannot understand why this court should assume that there was one, and thereupon upset the tax.

Further, there is no reference in the opinion of the Court of Appeals to any discrimination in fact.

Still further, counsel for plaintiff in error evidently fail to perceive any actual discrimination, as appears by this quotation from their brief:

"The questions involved in the appeal are:

"(1) That the act of 1899, providing for the assessment and taxation of shares of the capital stock of national banks, is repugnant to the provisions of section 5219 of the Revised Statutes of the United States:

"(*a*) Because shares of stock in the commercial banks of the State are not taxed and are exempt;

"(*b*) Because by reason of the failure to tax shares in the commercial banks of the State, the shares of national banks are subjected to an adverse discrimination, and taxed at a higher rate than such commercial bank shares;

"(*c*) Because the provisions, section 3609, are wholly void, in that it is thereby undertaken to provide that a stockholder may deduct from the value of his shares the amount of his debts due to *bona fide* residents of the State.

"(2) That under the express provision of the Political Code, sections 3608 and section 3609, the whole property of the appellant included in the assessment was exempt from taxation."

The only reference to discrimination is the alleged legal one, "by reason of the failure to tax shares in the commercial banks of the State." If the failure to tax shares in the commercial banks of the State does not of itself work a discrimination, as is practically conceded in the opinion of the court, then the whole basis of plaintiff's complaint fails.

Summing the matter up, the Constitution declares that "all property . . . shall be taxed in proportion to its value," and defines "property" as including "franchises, and all other matters and things, real, personal and mixed, capable of private ownership." Franchises, dividend-earning, profit-earning power, are capable of private ownership. Indeed, the opinion of the court is based on the contention that they are assessed to the holder of shares in national banks and not assessed upon the State banks. Section 3608 provides that "all property belonging to corporations (save and except the property of national banking associations, not assessable by Federal statute) shall be assessed and taxed." Section 3609, that the shares in national banking associations "shall be valued and assessed as is other property for taxation." The Supreme Court of the State holds that a stockholder in a State bank "could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate." There is neither allegation nor evidence that there was any overvaluation of the plaintiff's shares of stock. The complaint is that there was a discrimination by reason of the failure to deduct from the value of the shares the entire value of the bank's tangible property, because "used and employed by it in the conduct and carrying on its business as a national banking association." And yet in the face of the plain words of the Constitution and statutes, the clear language of the Supreme Court of California, and the absence of allegation or proof of actual discrimination, this court, by its opinion, strikes down the whole system of California for the taxation of shares of national banks.

But beyond and aside from the matters which I have considered, and conceding, for the purposes of the following suggestion, that the law of California providing for the taxation of shares of stock in national banks is invalid, still I insist that the decree of the Court of Appeals ought to be affirmed. This is an equitable suit brought in the United States court, where the distinction between law and equity is constantly enforced. Upon the theory of the opinion, the tax upon the shares of stock in the plaintiff bank was illegal. The statute of California imposing that tax was void.

Now, there are two propositions which have entered into the jurisprudence of this court so thoroughly that they may be regarded as settled law: First, that equity will not interfere where there is a plain, adequate and complete remedy at law; and, second, that injunction will not issue to restrain the collection of a tax simply on the ground of its illegality. The first is not only the rule of the Court of Chancery in England, but it is the command of the Federal statute. Section 723, Rev. Stat., reads: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

This defence was pleaded by the defendant in his answer, the sixteenth paragraph of which reads as follows:

"And respondent further submits to this honorable court that complainant has a full, complete, speedy and adequate remedy at law against respondent for all causes of action or causes of actions, stated or attempted to be stated in complainant's bill of complaint on file in this action; and he here claims the same benefit of the objection as if he had not demurred to the relief so sought."

Even if it had not been formally pleaded, the matter is one which this court of its own motion would consider and determine. As said in *Wright* v. *Ellison*, 1 Wall. 16, 22:

"But this is a suit in equity. The rules of equity are as fixed as those of law, and this court can no more depart from the former than the latter. Unless the complainant has shown a right to relief in equity, however clear his rights at law, he can have no redress in this proceeding. In such cases the adverse party has a constitutional right to a trial by jury. The objection is one, which though not raised by the pleadings nor suggested by counsel, this court is bound to recognize and enforce."

It is unnecessary to cite the many cases in this court in which this rule has been recognized, the latest being *Scottish Union Insurance Company* v. *W. G. Bowland, Treasurer &c.*, the opinion in which has just been filed, though reference may be made to the discussion by Mr. Justice Field in *Whitehead* v. *Shattuck*, 138 U. S. 146, and in *Scott* v. *Neely*, 140 U. S. 106, and by Mr. Justice Brown in *Wehrman* v. *Conklin*, 155 U. S. 314. Now, in California there is a perfectly adequate legal remedy for cases of this nature. Section 3819 of the Political Code provides that "the owner of any property . . . who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded; and when so paid under protest the payment shall in no case be regarded as voluntary payment, and such owner may at any time within six months after

such payment bring an action against the county in the Superior Court, to recover back the tax so paid under protest." Such a remedy has, in a case of the taxation of national bank shares, been held by this court adequate and complete, and sufficient to exclude the interposition of a court of equity. In *Dows* v. *City of Chicago*, 11 Wall. 108, which was a bill filed by the owner of shares of the capital stock of the Union National Bank of Chicago, to restrain the collection of a tax levied by that city upon his shares, we said (p. 112):

"The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

And this case was reaffirmed by the unanimous opinion of this court in the late case of *Pittsburg &c. Railway Company* v. *Board of Public Works*, 172 U. S. 32, in which the quotation I have just made is also quoted.

The second proposition to which I have referred has also been often decided. Out of the many decisions I refer to only two or three. *Dows* v. *City of Chicago, supra*, in which is this language (p. 109):

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection, The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked."

*State Railroad Tax Cases*, 92 U. S. 575, in which is this (p. 614):

"We do not propose to lay down in these cases any absolute limitation of the powers of the court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

And in *Pittsburg &c. Railway* v. *Board of Public Works, supra*, in which the rule is thus stated (p. 37):

"The collection of taxes assessed under the authority of a State is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

But it may be said that in the following cases this court has laid down an apparently different rule in respect to the taxation of national bank shares; *People* v. *Weaver*, 100 U. S. 539; *Pelton* v. *National Bank*, 101 U. S. 143; *Cummings* v. *National Bank*, Id. 153; *Hill* v. *Exchange Bank*, 105 U. S. 319, and *Evansville Bank* v. *Britton*, Id. 322; *Lander* v. *Mercantile National Bank*, 186 U. S. 458. The first was a writ of error to the Court of Appeals of the State of New York, and the mode of attack upon the law having been recognized by that court as proper, the question was not discussed here. In *Cummings* v. *National Bank*, *Pelton* v. *National Bank* being decided on its authority, the right to an injunction was asserted. The case came from the Circuit Court of the United States for the Northern District of Ohio, in which district the bank was located. In delivering the opinion of the court Mr. Justice Miller said on page 157:

"*But the statute of the State expressly declares* that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of Ohio, 1880, vol. 3, Laws of Ohio, 178, secs. 1, 2. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, *where a statute of a State created a new right or provided a new remedy, the Federal courts will enforce that right, either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. Van Norden* v. *Morton*, 99 U. S. 378. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced on the equity side of the court.

"The statute also answers another objection made to the relief sought in this suit, *namely, that equity will not enjoin the collection of a tax except under some of the well known heads of equity jurisdiction*, among which is not a mere overvaluation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases.

"Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is *designed* to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

Two reasons are here stated to justify the exception to the ordinary rule in respect to injunctive relief. First, a State statute, and, second, a design on the part of the State authorities to discriminate. There is no statute of California making such special provision in reference to injunctions, and that reason for a departure from the general rule may be put one side. The other implies an intent on the part of the legislature or assessing officials to discriminate. It does not mean simply that there has resulted a discrimination but that one was intended. It is well known that in the early days of the national banking law there was a strong prejudice against it in different portions of the Union and adverse legislation in the way of burdensome taxation was not uncommon, and it was because of that fact that the court permitted the exercise of the strong powers of equity. That I am right in this and that there has never been an intent to apply a different rule to a national bank from that which has been in force in respect to other property is made clear by the language of Mr. Justice Miller in a subsequent case, *National Bank* v. *Kimball*, 103 U. S. 732, 735. Delivering the opinion of the court, he says:

"An apparent exception to the universality of the rule is admitted in *People* v. *Weaver*, 100 U. S. 539, *Pelton* v. *National Bank*, 101 Id. 143, and *Cummings* v. *National Bank*, Id. 153. It is held in these cases that when the inequality of valuation is *the result of a statute of a State designed to discriminate injuriously* against any class of persons or any species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments *combine together and establish a rule or principle of valuation*, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject."

This ruling was somewhat like the action of the court in *Stanley* v. *Schwalby*, 162 U. S. 255. That was a case coming from a State court. Ordinarily when the judgment is reversed the order is to remand the case for further proceedings not inconsistent with our opinion, but in view of action theretofore taken by the State court in the case we felt constrained to direct the very judgment which should be entered.

In *Lander* v. *National Bank*, *supra*, a decree dismissing the bill filed by the bank was affirmed. It is true in the opinion the merits of the bill were discussed, and nothing said about the right to maintain a suit in equity. Evidently the matter passed without consideration, and not unnaturally so, as the bill on its merits was dismissed.

In the case before us, whatever may be the effect of the statute in creating or opening the door to discrimination, no one can read it and say

that there was an intent on the part of the legislature of California to discriminate injuriously against national banks. The statute is positive in its language that national bank shares shall be taxed and assessed as is other property, and there was beyond doubt an attempt on the part of the California legislature to cast only an equal burden of taxation on such shares. Of course, there ought not to be imputed to this court an intention to favor national bank property in the matter of taxation and to lay down a rule for its benefit which is denied to all other property. So were I wrong in my construction of the State statute, beyond any peradventure the decree of the Circuit Court of Appeals ought to be affirmed and the bank remitted to its legal remedy.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice BROWN and Mr. Justice PECKHAM concur in this dissent.

True copy.

Test:

*Clerk Supreme Court, U. S.*